Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

PRESTIGE FORD,

Petitioner,

v.

DEALER COMPUTER SERVICES, INC.,
FORMERLY KNOWN AS FORD DEALER COMPUTER SERVICES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit erred when it upheld the district court's confirmation of the Arbitration Award in violation of Petitioner's due process rights under the 5th and 14th Amendments to the United States Constitution.

2. Whether Petitioner's due process rights were violated when the Fifth Circuit refused to vacate the Arbitration Award when the award was procured by corruption, fraud, and/or undue means.

3. Whether Petitioner's due process rights were violated when the Fifth Circuit refused to vacate the Arbitration Award when the Arbitration Panel was guilty of misconduct in calculating the award which prejudiced the rights of Petitioner.

4. Whether Petitioner's due process rights were violated when the Fifth Circuit refused to vacate the Arbitration Award when the Arbitration Panel exceeded the powers given it by the Federal Arbitration Act in calculating the award.

5. Whether Petitioner's due process rights were violated when the Fifth Circuit refused to vacate the award when the Arbitration Panel acted in manifest disregard of the law in calculating the award.

6. Whether Petitioner's due process rights were violated when the Fifth Circuit refused to modify the award.

7. Whether Petitioner's due process rights were violated when the Fifth Circuit upheld the Arbitration Panel's refusal to compel the discovery requested by Petitioner in support of its anti-trust claims.

PARTIES TO THE PROCEEDING

The following is a list of parties to the proceedings in this case in the United States Court of Appeals for the Fifth Circuit:

1. Prestige Ford Garland Limited Partnership, doing business as Prestige Ford, Appellant-Petitioner

2. James D. Blume, and the Law Firm of Blume & Stoddard, Attorneys for Appellant-Petitioner

3. Dealer Computer Services, Inc., formerly known as Ford Dealer Computer Services, Inc., Respondent-Appellee

4. John C. Allen, Aaron D. Weinberg, and the Law Firm of John C. Allen, P.C., Attorneys for Respondent-Appellee

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in Case No. 02-50749 affirmed the Final Judgment of the United States District Court for the Western District of Texas, Austin Division, which entered a judgment in favor of Respondent confirming the Arbitration Award. The Fifth Circuit's April 23, 2003 Order denying Petitioner's Petition for Rehearing is printed here as Appendix A. The Fifth Circuit's March 25, 2003 opinion upholding the district court's Final Judgment confirming the Arbitration Award is printed here as Appendix B. The district court's June 12, 2002 Order denying Petitioner's Motion for Rehearing is printed here as Appendix D. The district court's May 17, 2002 Order denying Petitioner's Motion to Vacate Award is printed here as Appendix E. The district court's May 17, 2002 Final Judgment is printed here as Appendix F. The American Arbitration Association's November 29, 2001 Award is printed here as Appendix G. The American Arbitration Association's December 1, 2000 Fourth Order Concerning Discovery is printed here as Appendix K. The American Arbitration Association's December 1, 2000 Second Order Concerning Discovery is printed here as Appendix L. The American Arbitration Association's Third Order Concerning Discovery is printed here as Appendix N. The American Arbitration Association's First Order Concerning Discovery is printed here as Appendix P.

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit entered on May 25, 2003.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

APPLICABLE CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES

1. The Constitutional provisions applicable to this case are as follows:

Constitution of the United States

Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . . U.S.C. Const. Amend. V

Amendment XIV, § 1

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . U.S.C. Const. Amend. XIV

2. The statutes applicable to this case are as follows:

Title IX Federal Arbitration Act, 9 U.S.C. § 9. Award of Arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the awarded, and thereupon the court must grant

such an order unless the award is vacated, modified, or corrected as prescribed in section 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Title IX Federal Arbitration Act, 9 U.S.C. § 10. Same; vacation; grounds; rehearing

(a) 1-4

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown,

or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Title IX Federal Arbitration Act, 9 U.S.C. § 11. Same; modification or correction; grounds; order.

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration-

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

STATEMENT OF THE CASE

Basis for Federal District Court Jurisdiction:

Respondent, Dealer Computer Services, Inc., ("DCS") filed a claim in arbitration against Petitioner, Prestige Ford Garland Limited Partnership, doing business as Prestige Ford, ("Prestige") pursuant to the Federal Arbitration Act, 9 U.S.C. § *et seq.* for breach of contract. The Arbitration Panel entered an award in favor of DCS. Prestige filed a Motion to Vacate the Award in the United States District Court for the Western District of Texas, Austin Division. Jurisdiction was proper in the United States District Court for the Western District of Texas pursuant to 9 U.S.C. § 9 and 9 U.S.C. § 10. Jurisdiction was also proper pursuant to 28 U.S.C. § 1330 and 28 U.S.C. §1331, this being a dispute between a citizen of North Carolina, Prestige, and a citizen of Delaware, DCS, in excess of the monetary requirements set out in 28 U.S.C. §1331.

Facts Material to the Consideration of the Questions Presented:

Prestige, located in Garland, Texas, is an automobile dealer of new and used cars and trucks. DCS, located in Houston, Texas, sells computer systems to Ford dealers to run, operate, and manage their dealerships. In 1993, Prestige entered into a five-year contract with DCS for DCS to provide hardware, software, and maintenance services for Prestige's computer system.

In 1997, before the expiration of the five-year term, Prestige terminated its agreement with DCS due to poor performance of DCS's computer system and DCS's inability to perform timely maintenance on the system. Prestige had

repeatedly complained about poor service and performance in numerous telephone calls to DCS. DCS had been unresponsive.

In late July 1998, DCS filed a claim in arbitration against Prestige. Prestige filed a series of counterclaims against DCS. The last live pleading setting out those counterclaims is Prestige's Second Amended Counterclaims. *See* Appendix L. Pertinent to this Petition, Prestige asserted that there existed illegal tying arrangements. One illegal tying arrangement was between DCS's computer systems and Ford Motor Company, who had contractually granted a series of monopolies to DCS in the area of computer services. The other was between DCS's hardware and software, indistinguishable from the illegal tie found in *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993).

1. The General Ledger

The most important single document in this arbitration was the general ledger of DCS. A general ledger is the core financial document of any company and contains all of the expenditures and receipts of the company, categorized in a series of numbered/named accounts called "the chart of accounts." The original demand in arbitration by DCS was for the lost income from the Prestige contract. Therefore, it was clear at the outset that Prestige had to closely examine the accounting and financial records maintained by DCS in order to calculate DCS's damages.

The terms of the contract provided that Michigan law would govern any disputes between the parties. DCS had the burden of proving its damages for breach of contract

according to the damages formula provided by Michigan law.[1] The correct calculation of damages was the income less expenses associated with performing the contract discounted back to the present value. Put graphically the formula is as follows:

TOTAL INCOME

\- THE EXPENSES OF PERFORMING THE CONTRACT

= NET REVENUE

x THE DISCOUNT FACTOR x THE NUMBER OF YEARS

= LOST PROFITS

From Prestige's point of view, the most critical and unknown component of the formula were the expenses DCS incurred in performing the contract. The only way to calculate a proper measure of DCS's damages was to obtain and identify *all* of the expenses in performing the contract. Therefore, it is undisputed that it was essential for Prestige to obtain full and complete access to DCS's general ledger because a company's general ledger shows 1) all revenues, 2) all expenses, and 3) in this instance, those expenses associated with DCS' performance of the contract with Prestige.

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[1] *DXS, Inc. v. Siemens Medical Sys., Inc.*, 100 F.3d 462 (6th Cir. 1995); *Body Rustproofing, Inc. v. Michigan Bell Telephone Co.*, 385 N.W.2d 797 (Mich. Ct. App. 1985); *Davidson v. General Motors Corp.*, 326 N.W.2d 625 (Mich Ct. App. 1982); *Lawton v. Gorman Furniture Corp.*, 282 N.W.2d 797 (Mich. Ct. App. 1979).

Without access to this full and complete information from DCS's general ledger, Prestige's ability to defend itself against DCS's claims would be crippled.

In order to calculate DCS's lost profits pursuant to the Michigan formula, Prestige hired several experts. Among them were: 1) Dr. Allen Self, who holds a doctorate in economics as well as extensive academic credentials; 2) Mr. Allen Goodrick, a CPA and an auditor, who had performed numerous lost profit calculations for other companies; and 3) Mr. Randel C. Lomax, an attorney and CPA. Each opined that DCS's complete general ledger, tax returns, and financial statements were absolutely necessary to analyze the damages claimed by DCS and to evaluate Prestige's anti-trust claims. *See* Appendices H, J, M, and Q.

Accordingly, Prestige demanded the general ledger in discovery. DCS refused to produce it, along with other requested financial documents, which resulted in a series of motions (five in all) to compel, and a series of orders from the arbitrators granting, at least in part, the relief requested by Prestige. *See* Appendices K, N, O, and P.

The Panel did compel DCS to provide the complete revenue and expense portions of its general ledger. *See* Appendix K at App. 63 *and* Appendix O at App. 103-104. However, Prestige's experts discovered that the general ledger produced by DCS was both incomplete and altered. The first indication of alteration was missing page numbers. There were huge gaps in the page numbers. It was as though, in reading a novel, that the book skipped from page 100 to page 200. Substantive portions of the ledger were identified as omitted, the most obvious of which were the journals relating to cash transactions. They just were not there, as they should have been. Dr. Self stated, "THERE IS NO CASH

ACCOUNT, SHOWING DEBITS AND CREDITS BY ACCOUNT. This means that there is no way to track cashflows, capital expenditures (for equipment, for example), upstream dividends, income tax payments or Texas franchise tax payments, or many other truly significant matters highly germane to this proceeding." [Emphasis in original]. *See* Appendix J at App. 52.

DCS's explanation for the missing pages and lack of a cash account in the general ledger was the assertion of its counsel, without any evidence whatever, that DCS accounting program printed out the general ledger in non-sequential pages. This ridiculous explanation was completely impeached by the testimony of Mr. Allen Goodrick, Prestige's primary accounting expert. *See* Appendix H at App. 36-40 He testified that in his experience he had never seen any computerized accounting reports print out a general ledger in non-sequential pages. He is adamant that he did not have a complete general ledger, and he further testified that because he did not have all of the financial statements he had requested, "we cannot verify the *completeness or accuracy of the general ledger.*" *See* Appendix H at App. 40.

There was never any testimony from anyone at DCS that the general ledger, as produced, was true, correct, and accurate. Similarly, there was never any expert testimony from DCS refuting the assertion of Prestige's experts that the general ledger as produced was incomplete and altered.

The general ledger, as produced by DCS, was altered and altered in such a way as to delete information absolutely essential for Prestige's experts to determine the expenses attributable DCS in performing the contract with Prestige. As a result, Prestige was unable to adequately verify and analyze

the general ledger, thereby making an independent investigation of DCS's damages claim impossible.

2. Related Financial Information

In addition to the general ledger, Prestige's experts requested Prestige obtain additional financial information. The purpose of requesting this information was twofold: 1) to reconcile and confirm financial information in the general ledger, and 2) to develop information for Prestige's antitrust claim. With respect to the first purpose, reconciling and confirming financial information in the general ledger, the items requested were summarized by Mr. Randel Lomax, another accounting expert retained by Prestige in his report: 1) financial statements, 2) tax returns, 3) the complete general ledger, 4) a breakdown of salaries and expenses of employees performing the contract, 5) a breakdown of support costs by type of device supported by DCS, and 6) development costs for the periods covered by Ms. Robinson's [DCS's Director of Accounting] report. *See* Appendix M at App. 89, 95-96.

The Arbitration Panel never ordered this information produced despite Prestige's request for such information. As a result, as stated by Mr. Goodrick, *supra*, the accuracy and completeness of the general ledger could not be confirmed. *See* Appendix H at App. 40.

3. The "85%" Contracts

In support of its damages claim, DCS produced a report by Sheri Robinson, DCS's Director of Accounting. Ms. Robinson is not a CPA.

In the course of discovery, it was discovered that much of the performance of the contract with Prestige was not done by

DCS at all. Instead, DCS delegated most of the work to companies that were affiliated with it in various ways.[2] These companies included Universal Computer Systems, Inc., Universal Computer Services, Inc., and Universal Computer Consulting, Ltd. The damages report generated by Sheri Robinson attributed the expenses of these other companies as though they had been DCS's expenses. This was fraudulent and deceptive. In addition, it was discovered that DCS had agreed to pay these various companies 85% of the revenues from Prestige as payment for the services they performed. These payments were not disclosed by Ms. Robinson in her report, again showing an unwillingness on DCS's part to fairly and accurately produce the information requested of it by Prestige.

At the time of the arbitration hearing, Ms. Robinson was forced to admit that she had provided no information at all about DCS's expenses. In an excerpt from her testimony, the following exchange took place:

Q. (by Mr. Blume, lead counsel for Prestige):... "you looked at costs that were incurred by other companies and attributed them in your report, right?"

A. (by Ms. Robinson): "That is correct."

Q. (by Mr. Blume): Which means that if we were instead going to look merely at Dealer Computer Services, the claimant, we don't have the information on all of these variable costs because it's not in your report?"

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[2] The exact nature of the affiliations was never made clear. The testimony on this point from various DCS witnesses was, at best, contradictory.

A. (by Ms. Robinson): "I didn't believe that those costs were relevant."...

Q. (by Mr. Blume): "This information is not in your report?"

A. (by Ms. Robinson): "That is correct."

See Appendix I at App. 44-48.

This exchange reveals that DCS produced no information whatever about the expenses associated with the performance of the contract, as required by the Michigan formula. The information about the largest expense which was associated with the Prestige contract, these "85%" contracts with other entities, was not discovered in the general ledger, where it should have been, but in the 85% contracts themselves. The 85% contracts were given effect by the arbitrators and resulted in a huge reduction of DCS's damages claim.

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

1. The Fifth Circuit erred when it upheld the confirmation of the Arbitration Award in violation of Petitioner's due process rights under the 5th and 14th Amendments to the United States Constitution.

A. The Fifth Circuit erred when it upheld the confirmation of the Arbitration Award in violation of Petitioner's due process rights when the Arbitration Award was procured by corruption, fraud, and/or undue means.

B. The Fifth Circuit erred when it upheld the confirmation of the Arbitration Award in violation of Petitioner's due process rights when the Arbitration Panel was guilty of misconduct in calculating the award which prejudiced the rights of Petitioner.

C. The Fifth Circuit erred when it upheld the confirmation of the Arbitration Award in violation of Petitioner's due process rights when the Arbitration Panel exceeded the powers given it by the Federal Arbitration Act in calculating the award.

The statutory basis for vacatur of an Arbitration Award is found in 9 U.S.C. § 10 (a). The district court has the authority to vacate an Arbitration Award if: (1) the award was procured by corruption, fraud, or undue means; 2) there is evidence of partiality or corruption among the arbitrators; 3) the arbitrators are guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have

been prejudiced; or 4) where the arbitrators exceeded their powers. . . . *See* 9 U.S.C. § 10 (a) (1)-(4).

The gravamen of Prestige's case concerning DCS's damages is that the Arbitration Panel incorrectly calculated the award from the evidence that it did compel.[3] *See* Appendix G, Appendix K, *and* Appendix O. DCS had the burden of proving its damages for breach of contract according to the damages formula provided by Michigan law. The Panel did compel DCS to provide the revenue and expense portions of its general ledger. *See* Appendix K *and* Appendix O. The overriding problem here is that DCS did not produce the complete portions of the general ledger showing its expenses in performing the contract even though the Panel compelled them to do so. Without the complete general ledger stating its expenses, DCS's net revenue and lost profits were artificially inflated.

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[3] The Panel calculated the award by taking the income the contract with Prestige would have generated and deducted 85% from that income for expenses incurred by DCS is paying other companies to aid it in performing the contract. It then took that net revenue figure and multiplied it by the discount rate supplied by Sheri Robinson, DCS's accounting expert, and then multiplied that number by the remaining number of years left on the contract which yielded the net profits calculation. The Panel did not include a deduction for any expenses incurred solely by DCS in performing the contract. The resulting net profits calculation was therefore artificially inflated by the Panel's failure to deduct expenses incurred by DCS in arriving at its net revenue figure. Even though DCS had the burden of proving it was damaged, Prestige introduced the only evidence of expenses incurred by DCS in performing the contract when it introduced the evidence that DCS paid other companies 85% of its revenues to perform most of its obligations under the contract.

These artificially inflated net revenue and lost profits figures resulted in the Panel miscalculating the damages suffered by DCS. This is true because DCS did not produce any evidence, despite being compelled to do so, of its own expenses in performing the Prestige contract. *See* Appendix I at App. 44-48. The expenses portion of the general ledger it produced did not list expenses even those it paid to other companies to aid DCS in performing its contract with Prestige. Further, the general ledger it produced listed no expenses for such common business expenses as payroll, rent, office supplies, postage, and utilities. It is uncontroverted that the general ledger DCS produced included no cash account. *See* Appendix J at App. 52.

A general ledger without a cash account is like cereal without milk. The cash account includes deposits and expenditures. Expenditures include expenses. The Panel did not have access to these expenses when calculating its damage award. In its Fourth Order Concerning Discovery, the Panel denied Prestige's request that DCS produce its Texas Franchise Tax Reports. *See* Appendix K at App. 65. Even though it refused to compel DCS to produce the actual franchise tax reports themselves, franchise taxes are an expense of doing business in the state of Texas. Although the Arbitration Panel ordered the complete expense portion of the general ledger produced, the general ledger DCS produced did not include the payment of franchise taxes. This is just one more example of an expense properly attributable to DCS' performance of its contract with Prestige that was not taken into consideration by the Panel when it calculated the award. The Panel miscalculated the damages award because DCS failed to produce a complete listing of its expenses despite being ordered to do so. The Panel clearly misapplied the formula mandated by Michigan law.

The 5th Circuit Court of Appeals states in its Summary Calendar Opinion:

> [w]hat Prestige does not emphasize when presenting its arguments to this Court is that the reason the documents were "withheld" by DCS is that the arbitration panel, after holding hearings on motions to compel the very evidence at issue, explicitly decided against ordering DCS to produce the documents. Furthermore, even if a fraud of some sort did occur relating to the form in which DCS presented portions of its general ledger, the requisite nexus between the fraud and the basis for the Panel's award does not exist.

See Appendix B at App. 8.

In the foregoing excerpt from its opinion, the 5th Circuit Court of Appeals completely miscasts Prestige's argument and the Arbitration Panel's Orders Concerning Discovery. The Arbitration Panel did not explicitly decide against ordering DCS to produce the expense and revenue portions of the general ledger, the Panel did order them produced[4] but DCS failed to produce the complete expense portion of the general ledger. DCS's failure to follow the Panel's orders resulted in the Panel's miscalculation of the award. Fraud did exist and it bore directly on the calculation of the award. The Panel was denied information it needed to make a complete, legally sound, damage calculation. The 5th Circuit's summary disposal of this point by stating that the "requisite nexus between the fraud and the basis for the Panel's award does not

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[4] *See* Appendix K and Appendix O.

exist" without analyzing the effect of DCS's expenses on the award is untenable.

This 5th Circuit Court of Appeals cites *Forsythe International, S.A. v. Gibbs Oil Company of Texas*, 915 F.2d 1017 (5th Cir. 1990), for the proposition that the Panel heard arguments regarding allegations that the general ledger had been altered and reached its decision on grounds independent of the alleged fraud. *See* Appendix B at App. 8. Although Prestige argued that the general ledger had been altered because DCS failed to produce hundreds[5] of pages of the general ledger, *see* Appendix H at App. 37-40, Prestige's focus in this petition is on that portion of the general ledger the Panel compelled DCS to produce that it did not produce, the complete expenses portion.

Forsythe is distinguishable from this case in that the alleged fraudulent conduct did not itself impact the award calculation. *See Forsythe*, 915 F.2d at 1022-23. Here, the fraud did impact the award calculation by artificially inflating it. The Court in *Forsythe* stated that the requisite nexus may exist where the fraud prevents the Panel from considering a significant issue to which it does not otherwise enjoy access. *See Forsythe*, 915 F.2d at 1022.

The Panel did not have access to DCS's expenses in performing the contract, an essential element of the net profits calculation. Without expenses, the net profits calculation has

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[5] The following pages were missing from the general ledgers produced by DCS: 1) in 1994 pages 14-248, 263-282, and 430 to ??, 2) in 1997 pages 17-341, 375-406, 478, 517-??, 3) in 1998 pages 15-329, 370-398, and 514 to ??, and 4) in 1999 pages 19-352, 398-424, and 491 to ??.

no meaning. In *Forsythe*, the Court rendered its decision based on the parties' intent as measured by their actions, not on the fraudulent testimony. *See Forsythe*, 915 F.2d at 1022-1023. In this case, the Panel could not have calculated the award on a basis independent of DCS complete expenses in performing the contract, the Michigan net profits formula does not allow it. For this reason, the award is defective under Michigan law and the requisite nexus between the fraud and the award exists.

Arguably, the calculation the Panel made was correct based on the information DCS provided, but because DCS did not provide all of the expense information the Panel compelled, the award was procured by fraud and/or corruption and/or undue means requiring that it be vacated.

The 5th Circuit Court of Appeals states in its Summary Calendar Opinion that it finds "no particular statutory basis for attacking the propriety of the Panel's action in deeming specific portions of DCS's general ledger-and-other documents-irrelevant." *See* Appendix B at App. 8. For the sake of argument, Prestige will concede, as the 5th Circuit Court of Appeals states in its opinion, that the Panel deemed specific portions of DCS's general ledger irrelevant. Even if the Panel did deem some portions of the general ledger irrelevant, it did compel the production of the revenue and expense portions of the general ledger in their entirety. *See* Appendix K and O.

The issue in this case is not on what the Panel did not compel but is on what the Panel did compel, the complete revenue and expense portions of the general ledger. The revenue and expense portions of the general ledger are directly relevant to the calculation of DCS's damages because they provide the basis under Michigan law for the Panel's

award calculation. Because DCS did not produce its expenses in performing the contract with Prestige, the award is incorrect and the 5th Circuit upheld the award in violation of Petitioner's due process rights pursuant to the 5th and 14th Amendments to the United States Constitution.

The arbitrators were also guilty of misconduct when they failed to follow the Michigan net profits formula. The Panel's failure to follow the formula prejudiced the rights of Prestige because the Panel awarded DCS monetary damages in excess of what it should have awarded, if anything. And by failing to follow the formula, the Panel exceeded the powers granted to them by Michigan law.

In sum, three of the four grounds provided for in § 10 (a)(1) - (4) mandated that the 5th Circuit Court of Appeals reverse the district court's ruling in confirming the Panel's award. This, the 5th Circuit Court of Appeals did not do, and in failing to do so, it upheld the Arbitration Award in violation of Petitioner's due process rights pursuant to the 5th and 14th Amendments. The proper viewpoint in this case is whether DCS met its burden of proof with respect to its claim for breach of contract by proving that it suffered monetary damages as a result of Prestige's actions. The bottom line inquiry remains, was the Panel's award accurately calculated based upon the requirements of Michigan law? The only possible answer is no.

DCS presented no evidence of the expenses it incurred in performing the contract, therefore, the award is based on incomplete, incorrect, and corrupt information. Sheri Robinson, DCS's accounting expert, candidly admits that DCS produced no evidence of its own expenses. *See* Appendix I at App. 44-48. Not only did DCS fail to meet its burden on showing its damages, the Panel failed to follow

Michigan law in granting the award. It is for these reasons, Petitioner's due process rights under the 5th and 14th Amendments to the United States Constitution were violated when the 5th Circuit Court of Appeals upheld the United States District Court's Final Judgment confirming the Panel's Arbitration Award.

2. The Fifth Circuit erred when it upheld the confirmation of the Arbitration Award in violation of Petitioner's due process rights when the Arbitration Panel acted in manifest disregard of Michigan law in calculating the award.

In addition to vacating the award based on the statutory grounds delineated above, the 5th Circuit Court of Appeals should have reversed the district court's confirmation of the award on non-statutory grounds. Vacatur is justified based on the Panel's manifest disregard of the law. *See, e.g., Williams v. Cigna Financial Advisors, Inc.* 197 F.3d 752 (5th Cir. 1999).

> The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. The term "disregard" implies the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it. Judicial inquiry under the manifest disregard standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable.

See Merrill Lynch Pierce, Fenner, & Smith, Inc. v. Bobker, 808 F.2d 930, 933-34 (2nd Cir. 1986) (internal citations omitted)

The governing law was clear. The Michigan net profits formula requires that the expenses of performing the contract be deducted from total revenues. The arbitrators ignored the fact that DCS produced no evidence of the expenses attributable solely to its performance of the contract in calculating the award. By ignoring this in reaching the award, the Panel ignored a law that is well defined, explicit, and clearly applicable, and in doing so, they acted with manifest disregard for a clearly governing principle in reaching the award. Therefore, the 5th Circuit Court of Appeals violated Petitioner's due process rights when it upheld the award in violation of the controlling Michigan law.

3. The Fifth Circuit erred when it refused to modify the Arbitration Award in violation of Petitioner's due process rights under the 5th and 14th Amendments to the United States Constitution.

Under the Federal Arbitration Act, awards may be modified, but only in the event of "an evident miscalculation of figures." *See* 9 U.S.C. § 11 (a). The Fifth Circuit Court of Appeals has previously stated that an "evident miscalculation of figures" occurs where the record that was before the arbitrators demonstrates an unambiguous and undisputed mistake of fact and the record demonstrates strong reliance on that mistake by the arbitrators in making their award. *See Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 214 (5th Cir. 1993) (citing *National Post Office v. United Postal Service*, 751 F.2d 834 (6th Cir. 1985)).

In this case, there was an evident miscalculation of the figures exactly because the record demonstrates that the arbitrators failed to consider the expenses DCS incurred in performing the contract. Without evidence of expenses attributable to only DCS, the award is spurious. It goes

without saying that DCS had to incur expenses in performing the contract.[6] The arbitrators calculated the award without the added expenses DCS incurred. Without these expenses, the award is fatally defective. At the very least, the 5th Circuit should have remanded this matter for a new hearing before a new Panel of arbitrators so that the expenses the Panel compelled could be taken into account in calculating the proper award, if any. The Fifth Circuit Court of Appeals' refusal to modify the award in light of the Panel's miscalculation violated Petitioner's due process rights under the 5th and 14th Amendments to the United States Constitution.

4. The Fifth Circuit erred when it upheld the confirmation of the Arbitration Award in violation of Petitioner's due process rights when the Arbitration Panel refused to compel documentation requested by Prestige in support of its anti-trust claims.

The panel rejected Prestige's anti-trust claims stating that Prestige failed to establish either market power, anti-competitive effect, or antitrust injury. *See* Appendix G at App. 30. Prestige filed five different Motions to Compel seeking DCS's tax returns, DCS's financial statements, DCS's complete general ledger, and other documentation to support its anti-trust claims.

The panel refused to compel the tax returns and complete financial statements. *See* Appendix K *and* Appendix O. The

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[6] Sheri Robinson states during the arbitration that she did not look at the other expenses of DCS to determine if they might be variable costs and she also states that she did not include the costs that were only attributable to DCS in her report on which the Panel's award was calculated. *See* Appendix I at App. 44-48.

panel only compelled DCS to produce the revenue and expense portions of the general ledger. *See* Appendix K *and* Appendix O. The panel's refusal to compel the tax returns, all of the financial statements, and the complete general ledger completely undermined Prestige's ability to prosecute its anti-trust claims. Dr. Self stated that in order to evaluate whether DCS violated anti-trust laws, he needed accurate and dependable financial reports, statements, and corporate tax returns including the 1120 tax return. *See* Appendix Q at App. 108-111. Mr. Allen Goodrick testified that although he had been provided with a DCS balance sheet, he had not been provided with tax returns and other financial statements, such as income statements, statements of retained earnings, and cash flow statements. *See* Appendix H at App. 35-40.

The panel's failure to compel the production of this documentation and the 5th Circuit's refusal to set aside the district court's order confirming the Arbitration Award violated Petitioner's due process rights. Specifically, the Arbitration Panel's refusal to compel this production resulted in a violation of 9 U.S.C. § 10 (3). Section 10 states that "[i]n any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration, . . . (3) . . . in refusing to hear evidence pertinent and material to the controversy . . . . " *See* 9 U.S.C. § 10 (3). Here the arbitrators refusal to compel the production of all of the financial statements, the tax returns, and complete general ledger was tantamount to their refusal to hear evidence pertinent and material to the controversy.

When interpreting 9 U.S.C. § 10 (3), courts have held that an error that requires the vacation of an award must be one that is not simply an error of law, but which so affects the rights of a party that it may be said, the party was deprived of

a fair hearing. *See Grahams Service, Inc. v. Teamsters*, 700 F.2d 420, 422 (8th Cir. 1982). *See also Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3rd Cir.), *cert. denied*, 393 U.S. 954 (1968); *Totem Marine & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979); *Bell Aerospace Co. v. Local* 516, 500 F.2d 921, 923 (2nd Cir. 1974).

The facts of the instant case are similar to the facts in *Gulf Coast Industrial Workers Union v. Exxon Company, USA*, 70 F.3d 847 (5th Cir. 1995). In *Gulf Coast*, Exxon sought to introduce the testimony of its expert to show the marijuana cigarette stub found in the employee's vehicle contained marijuana.[7] *See id.* at 849. The arbitrator excluded the expert's testimony because it had admitted a business record into evidence showing the stub contained marijuana. *See id.* In spite of its ruling on the business record, the arbitrator ruled that Exxon had not proved just cause in terminating the employee pursuant to the collective bargaining agreement because the business record was hearsay. *See id.*

The Fifth Circuit Court of Appeals held the arbitrator's refusal to hear the expert's testimony required vacatur of the award because the evidence was pertinent and material to the controversy under 9 U.S.C. § 10 (3). *See id.* at 850. Here, the evidence the arbitrators refused to compel was not only pertinent and material to the controversy it was indispensable to the controversy. Each one of Prestige's experts testified that in order to defend itself and in order to meet its burden of proof with respect to its anti-trust claims, it needed the evidence requested by Prestige. *See* Appendices H, J, M, and

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[7] In *Gulf Coast*, such a violation required the employee's dismissal. *See id.*

Q. DCS failed to present any evidence by any expert in accounting, economics, or otherwise to refute Prestige's need for DCS's tax returns, financial statements, and complete general ledger. The Panel, whether deliberately or inadvertently, disemboweled Prestige's ability to prosecute its anti-trust claims when it refused to compel DCS to produce the foregoing accounting records and information.

In *Grahams Service, Inc. v. Teamsters*, 700 F.2d 420, 422 (8th Cir. 1982), the appellant company alleged the arbitration award should be vacated because the arbitrator excluded relevant evidence offered by the company concerning the employee's work record. *See id.* The Eighth Circuit upheld the district court's judgment confirming the arbitrator's award. *See id.* at 423. In doing so, the court held the exclusion of the evidence concerning the employee's work history was not relevant to the issue before the arbitrator, which was whether on one particular occasion the employee committed a major violation of company rules. *See id.* Such is simply not the case here, the accounting information Prestige moved to compel was essential to its claims because in order to establish illegal tying, market share, and monopolistic behavior, the tax returns were the best evidence because they were submitted to the federal government under penalty of perjury in violation of federal civil and criminal law. *See* Appendix Q at App. 108-111.

In *Columbia Medical Center of Lewisville v. Jeannean Heller*, No. 3:98-CV-1108-M, 2001 U.S. Dist. LEXIS 2069, at *1 (N.D. Tex. Feb. 15, 2001) Petitioners moved to vacate the award because the arbitrators failed to admit several exhibits into evidence. *See id.* at * 12-13. The court stated that Petitioners summarily stated that the arbitrators' failure to admit the exhibits substantially prejudiced them. *See id.* The court went on to state that "[w]ith these bald assertions

alone, however, the [Petitioners] have not met their burden under the FAA to establish [the exhibits] were material, or that their exclusion was prejudicial to them." *Id.* In *Columbia*, the district court had an opportunity to review the exhibits and concluded that they were not material and did not prejudice the Petitioners. *See id.* at *13. In light of its findings, the court held there was no violation of 9 U.S.C. § 10 (3). *See id.* at *13, *20. *Columbia* is again distinguishable from the instant case for two reasons: 1) here the district court did not have the excluded evidence available to it to determine whether it was irrelevant or immaterial, and 2) Prestige's reasoning for needing the excluded evidence was not based on bald assertions unsupported by expert opinion.

In *Lovell v. Harris Methodist Health System*, No. 3:99-CV-2809-G, 2000 U.S. Dist. LEXIS 3082, at *1 (N.D. Tex. March 10, 2000), the district court found that the arbitrator had not committed misconduct and that the arbitration hearing was not fundamentally unfair when the arbitrator excluded most of Petitioner's 51 witnesses, because 48 of them would have supplied redundant testimony. *See id.* at *9. The district court found that 48 of the witnesses would testify about exactly the same subject matter, specifically the deposition testimony of one of respondents' employees and the authenticity and relevance of specified documents. *See id.*

Like *Grahams, Columbia, and Lovell* are also completely inapposite and distinguishable from the instant case. In *Lovell*, the excluded evidence was available from other sources (the other three witnesses) and the court allowed some testimony on the subject even though it did not allow 48 versions of the same testimony. Here Prestige was precluded from presenting <u>any</u> evidence in support of its anti-trust claims against DCS because the Panel refused to allow

Prestige to obtain evidence pertinent and material to these claims.

In sum, the Arbitration Panel's refusal to compel evidence pertinent and material to the controversy resulted in Prestige's wholesale inability to meet its burden of proof with respect to its anti-trust claims, and for that matter its inability to verify DCS's expenses in performing the contract. The result was a fundamentally unfair hearing in violation of Prestige's due process rights pursuant to the 5th and 14th Amendments to the United States Constitution.

CONCLUSION

To promote and secure the purposes of the Federal Arbitration Act and similar alternative dispute methods, this Court should send a clear message to Plaintiffs and Defendants that their due process rights are guaranteed regardless of the forum. The 5th Circuit abrogated Prestige's due process rights when it upheld the district court's judgment confirming the award when it was procured by corruption, fraud, and/or undue means, when the arbitrators were guilty of misconduct in calculating the award thereby prejudicing Prestige's rights, when the arbitrators exceeded the powers given to them by the Federal Arbitration Act in calculating the award, and when the arbitrators acted in manifest disregard of the law in calculating the award. The Fifth Circuit further abdicated its responsibilities when it refused to modify the award and when it placed its rubber stamp of approval on the Arbitration Panel's refusal to compel Prestige's requested discovery in support of its anti-trust claims. Review by this Court is warranted to prevent similar abuses of the arbitration process in the future.

Respectfully submitted,

BLUME & STODDARD,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-50749

[Filed April 23, 2003]

PRESTIGE FORD
Plaintiff - Appellant
v.
FORD DEALER COMPUTER SERVICES, INC.,
formerly known as Dealer Computer Services, Inc.
Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING

Before REYNALDO G. GARZA, HIGGINBOTHAM, and BENAVIDES, Circuit Judges.

PER CURIAM:

It is ordered that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:
/s/ _____
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-50749
SUMMARY CALENDAR

[Filed March 25, 2003]

PRESTIGE FORD
Plaintiff - Appellant

v.

FORD DEALER COMPUTER SERVICES, INC.,
formerly known as Dealer Computer Services, Inc.
Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas, Austin Division
A-02-CV-137-JN
James R. Nowlin, Chief Judge

JUDGES:
Before REYNALDO G. GARZA, HIGGINBOTHAM, and BENAVIDES, Circuit Judges.

OPINION

REYNALDO G. GARZA, Circuit Judge:

In this appeal we are asked by plaintiff-appellant Prestige Ford ("Prestige" or "Prestige Ford") to review a district court's decision upholding a commercial arbitration award rendered in favor of defendant-appellee Ford Dealer Computer Services ("DCS"). For the following reasons, we affirm the district court's decision.

I. FACTUAL & PROCEDURAL BACKGROUND

Prestige Ford is an automobile dealership located in Garland, Texas. DCS, located in Houston, Texas, sells computer systems, which are designed to assist Ford dealers in managing their operations. On January 28, 1993, Prestige Ford entered into a written contract with DCS, under which DCS agreed to provide Prestige with hardware, software and maintenance related to one of its computer systems. According to the arbitration panel, the contract's initial five-year term was extended for an additional five years, amounting to a total contract period of ten years, commencing at the installation date.

In September of 1997, Prestige Ford announced its intention to terminate the agreement with DCS. Prestige later alleged that it terminated the agreement because the computer system DCS had provided did not operate correctly and because DCS was unable to perform maintenance for the system in a timely fashion. The contract between the parties contained an arbitration clause, which provided that disputes would be governed by the commercial arbitration rules of the American Arbitration Association.

In July of 1998, DCS filed a claim in arbitration against Prestige Ford, alleging that Prestige had breached the contractual agreement. In response, Prestige Ford filed a series of counterclaims against DCS, including claims of fraud, antitrust violations, and breach of contract.

Prior to the arbitration hearing, Prestige Ford filed five separate motions to compel DCS to produce documents. The three-member arbitration panel heard oral argument on each of the motions to compel, and issued written orders granting or denying each of the various requests.

Arbitration proceedings were held in Austin, Texas, beginning August 6, 2001 and continuing through August 14, 2001. Following the proceedings, the arbitration panel issued its decision. The panel found that Prestige's letter purporting to terminate the agreement with DCS amounted to a breach of contract, and awarded damages in the amount of $101,752.32. The panel also found that Prestige Ford had not met its burden of proof with regards to any of its counterclaims, and, consequently, rejected each such claim in turn. Finally, citing to the "Default" provision of the agreement between DCS and Prestige, the panel awarded DCS $337,459.76 in costs and attorney fees.

Following the panel's decision, Prestige Ford filed a motion to vacate the arbitration award in the United States District Court for the Western District of Texas. On March 13, 2002, DCS filed both a response to Prestige's motion and its own motion seeking confirmation of the award. In addition, DCS filed a Motion for Protection and to Have Exhibits Kept Under Seal, which the court granted. After reviewing the remaining motions, the district court refused to

vacate the arbitration award and granted DCS's motion to confirm the award.

After the district court entered its final judgement in the matter, Prestige Ford moved for rehearing pursuant to FED. R. CIV. P. 59. The district court denied the motion for rehearing and ordered Prestige Ford to pay all costs related to the preparation of DCS's response to the motion. Thereafter, Prestige filed timely notice of this appeal.

II. STANDARD OF REVIEW

On appeal, Prestige Ford presents a number of arguments related to the arbitration award and the fairness of the proceedings leading up to it. In cases like this, we review the district court's decision using a de novo standard. *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1020-21 (5th Cir. 1990). "Usually, however, the district court's review of an arbitration award is extraordinarily narrow." *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir. 1995) (internal quotations and citation omitted). "De novo review on the ultimate issue of unfairness enables us to assess whether the district court accorded sufficient deference in the first instance, an assessment that a more restrictive appellate review would cripple." *Forsythe Int'l, S.A.*, 915 F.2d at 1021.

III. DISCUSSION

As noted above, Prestige Ford offers a number of arguments related to the fairness of the arbitration proceedings and the arbitration award that resulted therefrom. Ultimately, Prestige seeks vacatur of the award, or, in the alternative,

modification of the award. Before addressing Prestige's several arguments, it should be noted that the central tenet of their appeal involves the contention that they should have been provided with the "complete general ledger and other financial documents" they sought to discover from DCS. According to Prestige, these documents were "essential" in order to "develop and prove its case against DCS."

Although DCS urges that this matter is little more than a discovery dispute, Prestige fervently argues that the "thrust of this appeal is far more fundamental." According to Prestige, "the deprivation of complete financial documentation in this case resulted in the wholesale denial of Prestige's ability to defend itself against DCS or prove its counterclaims."

Despite their continued attempts to downplay the discovery-dispute-like nature of their appeal, even Prestige admits that their position centers on the arbitration panel's refusal to compel the discovery of certain evidence. In fact, the district court hit the proverbial nail on the head when it noted that the gravamen of Prestige's case is that the arbitration panel ruled incorrectly on Plaintiff's motions to compel production of certain DCS financial documents. It is in this light that Prestige's appeal must be considered.

A. Prestige's Argument that DCS's Alteration and Withholding of Evidence Resulted in the Denial of a Fair Hearing.

Prestige argues that DCS's general ledger was produced in altered form and that key sections of the document had been deleted. Prestige also avers that other financial records which were necessary to properly analyze DCS's claims for

damages were withheld by DCS. According to Prestige, the arbitration panel's lack of action in response to DCS's alleged misconduct presents a number of grounds for vacatur of the arbitration award.

The arbitration process is a speedy and informal alternative to litigation, and, by its very nature, is intended to resolve disputes without confinement to many of the procedural and evidentiary strictures that protect the integrity of formal trials. *Forsythe Int'l, S.A.*, 915 F.2d at 1022. Parties to voluntary arbitration may not superimpose rigorous procedural limitations on the very process designed to avoid such limitations. *Id.*

Submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial; but because the advantages of arbitration are speed and informality, the arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him. *Id.* Thus, whatever indignation a reviewing court may experience in examining the record, it must resist the temptation to condemn imperfect proceedings without a sound statutory basis for doing so. *Id.*

The statutory basis for vacatur of an arbitration award is found in 9 U.S.C. § 10(a). According to the statute, the district court has the authority to vacate an arbitration award if: (1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers. *Id.* (citing 9 U.S.C. § 10).

We agree with the district court's conclusion that Prestige does not meet any of the § 10(a) requirements. What Prestige does not emphasize when presenting its arguments to this Court is that the reason documents were "withheld" by DCS is that the arbitration panel, after holding hearings on motions to compel the very evidence at issue, explicitly decided against ordering DCS to produce such documents. Furthermore, even if a fraud of some sort did occur relating to the form in which DCS presented portions of its general ledger, the requisite nexus between the fraud and the basis for the panel's award does not exist. In this case, the record indicates that the panel heard arguments regarding the allegations that the general ledger had been altered and reached its decision on grounds independent of the alleged fraud. *See id.* at 1022-23 (where the panel hears the allegation of fraud and then rests its decision on grounds clearly independent of the issues connected to the alleged fraud, the statutory basis for vacatur is absent; the panel effectively ruled that the asserted fraud issue was immaterial).

As noted, we find no particular statutory basis for attacking the propriety of the panel's action in deeming specific portions of DCS's general ledger -and other documents- irrelevant. Arbitrators are not bound to hear all of the evidence tendered by the parties; however, they must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments. *Id.* at 1023 (citing *Hoteles Condado Beach v. Union de Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985). In the case at hand, hearings were held and each disputed item was given consideration by the panel; thus, more than adequate opportunity was afforded to the parties and the minimum standards of fundamental fairness were met. *See id.*; *Teamsters, Local Union 657 v. Stanley*

Structures, Inc., 735 F.2d 903, 906 (5th Cir. 1984); *Bowles Financial Group, Inc. v. Steel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994); *see also International Union UAW v. Kraft Foods, Div. Of Kraftco, Inc.*, 409 F. Supp. 559, 562 (E.D.Pa. 1976) (decisions as to relevance and admissibility of evidence belong to arbitrators alone).

B. Prestige's Argument that the Award Should be Vacated on Non-Statutory Grounds.

Prestige also urges that vacatur is justified based on the panel's manifest disregard of the law and on public policy grounds. This Court has adopted the "manifest disregard of the law" standard as a non-statutory ground for vacating an arbitration award. *See, e.g., Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 759 (5th Cir. 1999). Though it was handed down prior to this Circuit's adoption of the "manifest disregard of the law" standard, our decision in *R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534, 539 n.1 (5th Cir. 1992), contains a brief description of its nature. In addition, *Welch* cites the Second Circuit's decision in *Bobker*, which offers the following insight:

> "Manifest disregard of the law" by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S. Ct. 182, 187-88, 98 L. Ed. 168 (1953). It is not to be found in the federal arbitration law. 9 U.S.C. § 10. Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law. The

> error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it. To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933-34 (2nd Cir. 1986) (internal citations omitted).

If it is not clear from the above paragraph, the "manifest disregard" standard is an extremely narrow, judicially-created rule with limited applicability. In the case at hand, the record does not indicate that the arbitrators ignored the existence of any clearly governing principle in reaching its award. *See id.* Furthermore, given the limited record available to this Court, absent further documentation in the record suggesting a willful inattentiveness to the governing law, it would be difficult to find that the arbitration panel acted with manifest disregard for an applicable legal principle without undermining our stated deference to the arbitration process. *See id.*; *see also ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995). Thus Prestige's arguments

related to the arbitrators' "manifest disregard of the law" ultimately prove unpersuasive.

Prestige also argues that public policy supports vacatur. According to Prestige, "vacatur of this award would reinforce the integrity of arbitration and encourage the long-held public policy of encouraging arbitration." The Fifth Circuit, following the Supreme Court's lead, does recognize some circumstances in which a court may refuse to enforce an arbitration award that is contrary to public policy. *See Gulf Coast Industrial Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 248-49 (5th Cir. 1993). This Court -citing one of the leading Supreme Court cases on the issue, *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) - has noted that:

> When applying the narrow public policy exception, courts are forbidden to use imprecise notions of public policy which would allow ill-defined considerations to negate the rule favoring judicial deference. At the very least . . . an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced.

Gulf Coast Industrial Workers Union, 991 F.2d at 249 (internal quotations omitted).

The Supreme Court has made clear that any public policy used to vacate an arbitration award must be "explicit," "well defined," and "dominant." *W.R. Grace & Co. v. Rubber*

Workers, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, 76 L. Ed. 2d 298 (1983). In addition, the public policy must be ascertained by reference to laws and legal precedents, and not from general considerations of proposed public interests. *Id.*

The arguments Prestige offers -and in particular, the evidence in support of those arguments- fall well short of establishing an explicit, well-defined and dominant public policy. *See id.* Therefore the arguments related to vacatur based on public policy are unavailing.

C. Prestige's Argument that the Arbitration Award Should be Modified.

Prestige also submits that this Court should modify the arbitration award pursuant to 9 U.S.C. § 11(a). According to Prestige, the award should be modified so that DCS would receive a total of zero dollars.

Under the *Federal Arbitration Act*, awards may be modified, but only in the event of "an evident material miscalculation of figures." 9 U.S.C. § 11(a). This Court has previously noted that an "evident material calculation" occurs "where the record that was before the arbitrator demonstrates an unambiguous and undisputed mistake of fact and the record demonstrates strong reliance on that mistake by the arbitrator in making his award." *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 214 (5th Cir. 1993) (citing *National Post Office v. United States Postal Service*, 751 F.2d 834, 843 (6th Cir. 1985)). In the case at hand, there was no "evident material miscalculation." *See id.*; *see also Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 194 (4th Cir. 1998).

IV. CONCLUSION

As the district court noted in its opinion, when parties agree to arbitration, they agree to accept whatever reasonable uncertainties might arise from the process. Undoubtedly, one party will emerge from an arbitration feeling that they were in some way shortchanged. That, however, does not alter or affect the limited role of the courts in reviewing arbitration awards. For the aforementioned reasons, the judgement of the district court is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILE NO. 1-02-CV-137

[Filed July 10, 2002]

PRESTIGE FORD	)
Plaintiff,	)
	)
v.	)
	)
FORD DEALER COMPUTER SERVICES, INC.,	)
n/k/a Dealer Computer Services, Inc.	)
Defendant.	)
	)

NOTICE OF APPEAL

Notice is hereby given that Prestige Ford, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from a final judgment entered in this action on the 16th of May, 2002, and an order denying Plaintiff's Motion for Rehearing entered in this action on the 12th day of June, 2002.

/s/ _____

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Attorney for Plaintiff
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(214) 373-7788
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Notice of Appeal was delivered via certified mail, return receipt requested on this 9th day of July, 2002, to:

John C. Allen
Law Offices of John C. Allen
1225 Two Houston Center
909 Fannin
Houston, Texas 77010

/s/ _____
James D. Blume

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-02-CV-137 JN

[Filed June 12, 2002]

PRESTIGE FORD	)
	)
v.	)
	)
FORD DEALER COMPUTER SERVICES, INC., n/k/a Dealer Computer Services, Inc.	)

ORDER

Before the Court are Prestige Ford's Motion for Rehearing (Clerk's Doc. No. 10) and DCS' Response to Prestige Ford's Motion for Rehearing (Clerk's Doc. No. 11). Upon review of the pleadings, the applicable legal authorities, and the entire case file, the Court enters the following Order.

In its Motion, Plaintiff complains of the Court's rejection of its argument that the arbitration award should be vacated pursuant to 9 U.S.C. § 10(a) and proceeds to rehash the same arguments the Court specifically rejected in the Court's last Order. As the Court does not play the ask-until-you-get-an-answer-you-like game, these arguments fare no better this

time. In addition, Plaintiff laments the fact that the Court did not address its due-process argument. Failure to address silly arguments is fairly standard practice for this Court. However, since Plaintiff appears bent on getting this argument answered (and is going to have to pay Defendant's attorneys' fees related to this Motion), the Court will address this novel and challenging legal proposition, to wit: There is no state action for purposes of a due-process argument when the Federal Arbitration Act merely compels parties to arbitrate issues that they have *contractually* agreed to arbitrate.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Rehearing is hereby DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff shall pay Defendant's reasonable attorneys' fees associated with preparing Defendant's Response to this Motion.

SIGNED AND ENTERED this 12th day of June, 2002.

/s/ _____
JAMES R. NOWLIN
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-02-CV-137 JN

[Filed May 17, 2002]

PRESTIGE FORD	)
	)
v.	)
	)
FORD DEALER COMPUTER SERVICES, INC., n/k/a Dealer Computer Services, Inc.	)
	)

ORDER

Before the Court are Prestige Ford's Motion to Vacate Award (Clerk's Doc. No. 1), DCS' Response to Prestige Ford's Motion to Vacate Award and DCS' Motion to Confirm Award (Clerk's Doc. No. 3), and Prestige Ford's Reply to DCS's Response to Prestige Ford's Motion to Vacate Award and DCS's Motion to Confirm Award (Clerk's Doc. No. 6). Upon review of the pleadings, the applicable legal authorities, and the entire case file, the Court enters the following Order.

Background

In August 2001, the parties arbitrated Defendant's breach of contract claim and Plaintiff's antitrust claim. On 30 November 2001, the arbitration panel awarded Defendant the sum of $101,752.32. Plaintiff now seeks the vacatur or modification of this award pursuant to the Court's power under the Federal Arbitration Act ("FAA"), 9 U.S.C. § § 1-307; Defendant seeks confirmation of the award under the same Act.

Vacate?

Plaintiff asks the Court to vacate this award pursuant to its power under 9 U.S.C. § 10(a).

Section 10(a) states that

> the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-(1) Where the award was procured by corruption, fraud, or undue means. (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (4) Where the arbitrators exceeded their powers, or so

> imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Moreover, "[j]udicial review of an arbitration award is extraordinarily narrow and this Court should defer to the arbitrator's decision when possible." *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990). With the foregoing in mind, the Court will not vacate this award. Simply stated, Plaintiff cannot meet its burden under § 10(a). The gravamen of Plaintiffs Motion is that the arbitration panel ruled incorrectly on Plaintiff's motions to compel the production of certain of Defendant's financial information. Plaintiff contends that these errors prevented them from being able to prepare a proper defense. Assuming, *arguendo*, that Plaintiff is correct in this assertion, Plaintiff does not meet any of the § 10(a) requirements. Section 10(a) requires corruption, fraud, misconduct, or an indefinite award. None of these are present in this case. It may be that the panel made some incorrect discovery rulings. However, Congress did not authorize this Court to review arbitration awards *de novo* and to vacate awards that don't pass legal muster.

Modification?

Plaintiff also asks the Court to modify the award to the amount of $0. The Court will refuse this request as well. Section 11(a) of the FAA empowers this Court to modify an award "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award." 9 U.S.C. § 11(a). In support of their assertion that the Court should modify the award, Plaintiff states that while the

contract payments were reduced by 85% to reflect payments by DCS to affiliated companies, "[t]he Panel failed to consider any other expenses of DCS." Again, assuming, *arguendo,* that Plaintiffis correct in its assertion that the panel should have reduced the award further for "other expenses of DCS," this error does not rise to the level of "an evident material miscalculation." *See Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.,* 142 F.3d 188, 194 (4th Cir. 1998) (stating that "courts have held generally that even a mistake of fact or misinterpretation of law by an arbitrator provides insufficient grounds for the modification of an award" and that the evident miscalculation must "appear on the face of the arbitration award.").

The Fifth Circuit said it best: "'When... parties agree[ ] to arbitration, they agree[ ] to accept whatever reasonable uncertainties might arise from the process,' *Raiford v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 903 F.2d 1410, 1413 (11th Cir. 1990). The size of an award is one such uncertainty, and a claimant's dissatisfaction alone will not support judicial modification of that award." *McIlroy v. PaineWebber, Inc.,* 989 F.2d 817, 821 (5thCir. 1993). Another such uncertainty is that the arbitration panel will make mistakes that cannot be appealed and which this Court is not authorized to vacate or modify under the FAA.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff' s Motion to Vacate Award is hereby DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant' s Motion to Confirm Award is hereby GRANTED pursuant to 9 U.S.C. § 9.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this case is CLOSED and that any pending motions are hereby DENIED AS MOOT.

SIGNED AND ENTERED this 16th day of May, 2002.

/s/ _____
JAMES R. NOWLIN
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-02-CV-137 JN

[Filed May 17, 2002]

PRESTIGE FORD	)
	)
v.	)
	)
FORD DEALER COMPUTER SERVICES, INC., n/k/a Dealer Computer Services, Inc.	)
	)

FINAL JUDGMENT

Before the Court is the above entitled cause of action. Upon review of the entire case file and this Court's Order which denied Plaintiffs Motion to Vacate and granted Defendant's Motion to Confirm, the Court enters the following Final Judgment pursuant to Federal Rule of Civil Procedure 5 8.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion to Vacate Award is hereby DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant's Motion to Confirm Award is hereby GRANTED pursuant to 9 U.S.C. § 9.

SIGNED AND ENTERED this 16th day of May, 2002.

/s/ _____
JAMES R. NOWLIN
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX G

AMERICAN ARBITRATION ASSOCIATION

CASE NO. 54 117 00326 98

[Dated November 29, 2001]

FORD DEALER COMPUTER SERVICES, INC., n/k/a DEALER COMPUTER SERVICES, INC.	)
v.	)
PRESTIGE FORD	)

AWARD

This arbitration was commenced pursuant to a demand made by Ford Dealer Computer Services, Inc., n/k/a Dealer Computer Services, Inc. ("DCS"), against Prestige Ford ("Prestige"). The issue raised in the arbitration demand was breach of an agreement dated January 28, 1993, and subsequent amendments thereto ("Agreement"). Prestige answered the demand and filed counterclaims alleging breach of contract, fraud and "breach of the antitrust laws of the United States and states therein." An arbitration was conducted pursuant to Section 18 of the Agreement between the parties:

> Except as provided otherwise in the Agreement, all disputes, claims, controversies and other matters in question between the parties to this Agreement, arising out of, or relating to this Agreement, or to the breach thereof, including any claim in which either party is demanding monetary damages of any nature including negligence, strict liability or intentional acts or omissions by either party, and which cannot be resolved by the parties, shall be settled by arbitration in accordance with the arbitration procedure described below.

An arbitration hearing was held in Austin, Texas from August 6, 2001, through August 14, 2001. A reporter was present throughout the hearing and the transcript was designated the official record of the hearing. The hearing was declared closed with the submission of post-trial briefs on October 31, 2001. The decision of the panel is as follows:

DCS'S CLAIM FOR BREACH OF CONTRACT

The panel finds that the initial term of the Agreement (per Amendment No. 01) was five years, and in December 1994, a contract amendment (No. 17) was executed extending the term for an additional five years, for a total of ten years from the initial installation date. By letter of September 30, 1997, counsel for Prestige indicated that they would no longer perform the Agreement: "Effective October 1, 1997, Prestige Ford will cease paying for services which are no longer useful." The panel finds that this constituted a breach of the Agreement by Prestige.

The issue of the amount of damages to which DCS is entitled as a result of the breach is not so easily addressed. DCS argues that, for purposes of recovering damage, the contracts between DCS and its affiliated subcontractors, Universal Computer Consulting, Ltd. ("UCC") and Universal Computer Services, Inc. ("UCS"), should be ignored, and that labor costs incurred by the latter two corporations should be treated as labor costs of DCS. To do otherwise, DCS contends, would give a windfall to Prestige, simply "because of the way DCS chose to structure its business." Testimony of Nicholas D'Ambrosio, Jr., Day 6, pp. 92-93, 161-162.

The cases cited by DCS, although invoking fact patterns disparate from those at hand, do support the proposition that corporate entities can, in appropriate circumstances, be merged for equitable purposes, i.e., to achieve a complete damage award. The question accordingly becomes: Is this an appropriate circumstance for disregarding the separate "corporate formalities" of the affiliated entities and treating them as a single entity?

The legal theory asserted by DCS to justify its equitable damage calculation (see e.g., Nicholas D'Ambrosio, Jr., Day 6. pp. 158-169), i.e., the application of a constructive receipt analysis to require payment to DCS of net profits "DCS's subcontractors would have enjoyed" (D'Ambrosio Report, Diagram D), is not supported by proof of a nexus between the separate corporate entities sufficient to make such an award. There is a failure of proof regarding the nature, extent and circumstances of the affiliation among the several companies and, more importantly, the basis for, the circumstances of, and the financial consequences of, the two contracts between affiliates and the apparent downstreaming of revenues which

occurred thereunder. The contracts are presumably valid and meaningful, both from an economic and a legal standpoint, and would be used as such in a defensive context. They cannot, without more, be ignored when DCS is the plaintiff. Consequently, while DCS is entitled to recover 15% of the contract payments, representing the benefit of the bargain DCS would have received under the Agreement, it is not entitled to the 85% of the contract payments allocable to UCS and UCC for services to be rendered by them.

Applying this analysis to the Summary of Damages tendered by Ms. Sheri Robinson, and accepting her present value calculation, yields a damage figure of $101,752.32. The panel awards that amount to DCS as damages for its breach of contract claim.

PRESTIGE'S CLAIM FOR BREACH OF CONTRACT

Prestige claims various breaches of contract by DCS, including that: 1) the system failed to function properly; 2) the system was slow and unresponsive; 3) customer service histories were lost; 4) the help line and training was ineffective; and 5) $200,000 in parts inventory loss was suffered when Prestige controverted from the old inventory system to the DCS system.

The panel finds that Prestige has not met its burden of proof to establish a breach of contract on any of these claims. First, the contract specifically disclaims many of the bases for these allegations of breach, including, for example, any representations or warranties regarding "up-time" and that lack of system availability will not constitute a breach of the

agreement. *See generally*. Agreement, Section 2.E. and Section 5.D. Moreover, the panel notes there is no evidence that any written complaint was ever sent by Prestige or received by DCS regarding these issues, and the letter terminating any further payments under the contract makes no reference to any specific deficiencies in the performance by DCS. Finally, the panel finds that Prestige did not establish a sufficient causal connection between the $200,000 parts inventory loss and the installation of the DCS system. The fact that an inventory shortage had not occurred either before or since the transition is not sufficient to establish that the DCS system was the reason for the shortage. Jerry Reynolds, Day 7, p. 25.

Based upon consideration of both the law and the evidence presented, the panel finds that Prestige has not established any breach of contract by DCS.

PRESTIGE'S CLAIM OF FRAUD

Prestige alleges that DCS made certain fraudulent representations, including that the DCS 7000 computer was "equivalent" to an IBM 9370, that it was "based on IBM 9370 architecture," that it was a mainframe computer, and that it was "state of the art." The panel finds that the claim of fraud has not been established. First, the panel notes that Section 19(B) of the Agreement provides that:

> No prior representations or statements, written or oral, shall be deemed to be part of this Agreement unless specifically set forth herein.

The panel notes that Michigan law has repeatedly held that "where a valid and binding agreement is integrated, it supercedes inconsistent terms or prior agreements and previous negotiations to the extent that it is inconsistent with them." *John Harris & Associates, Inc. v. Day*, 916 F.Supp. 651, 656 (E.D. Mich. 1996) (quoting *Ditzik v. Schaffer Lumber Co.*, 139 Mich. App. 81, 88, 360 N.W.2d 876 (1984)). *See also, Cook and Cook Enterprises, Inc. v. Little Caesar Enterprises, Inc.*, 972 F.Supp 400, 406 (E.D. Mich. 1997). We need not reach the question whether the representations at issue are in the nature of generalized statements of quality or "puffing," because the Agreement's integration clause negates any claim of fraud.

PRESTIGE'S ANTITRUST CLAIMS

Prestige raises two separate claims for illegal tying. First, Prestige claims that Ford and DCS tied the sale and leasing of Ford motor vehicles to the purchase of DCS's dealer management system. Second, Prestige claims that DCS tied its computer hardware products and services to the licenses of its software. Both claims fail.

First, Prestige failed to establish that dealers were refused either automobiles or parts and services if they failed to purchase the DCS dealer management system. Second, Prestige failed to establish that DCS hardware and software was ever marketed or sold as other than an integrated product. Moreover, Prestige failed to establish either market power, anti-competitive effect, or antitrust injury. Consequently, the panel rejects Prestige Ford's antitrust claims.

DCS'S CLAIM FOR ATTORNEYS FEES

Based on the provision in Section 13, "Default," of the Agreement, "Dealer agrees to reimburse FDCS for any and all expenses FDCS may incur, including reasonable attorneys fees in collection of any amounts due under this agreement..." and because the costs claimed by DCS are undisputed and Prestige stipulated the reasonableness of DCS's attorney fees, the panel awards DCS $337,459.76 in costs and attorney fees.

This Award resolves all claims submitted to this arbitration.

Dated: November 29, 2001.

/s/ _____
Michael L. Beatty

/s/ _____
Robert A. Gammage

/s/ _____
Lawrence R. Abramozyk

APPENDIX H

AMERICAN ARBITRATION ASSOCIATION

CIVIL ACTION NO. 54 117 00326 98

FORD DEALER COMPETITOR SERVICES, INC. n/k/a DEALER COMPUTER SERVICES, INC.	)
Plaintiffs	)
vs.	)
PRESTIGE FORD	)
Defendant	)

COMMERCIAL ARBITRATION
VOLUME 4
Thursday, August 9, 2001

BE IT REMEMBERED THAT AT 9:00 a.m. on Thursday, August 9, 2001, the above-entitled matter came on for continued hearing at the Four Seasons Hotel, 98 San Jacinto Blvd., Austin, Texas 78701, before ARBITRATORS ABRAMCZYK, BEATY and GAMMAGE; and the following proceedings was reported by Randall N. Finch, Certified Shorthand Reporter.

American Arbitration Association
Excerpted Transcripts - 8/9/01

APPEARANCES

[p. 2]
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-and-
Mr. Aaron Weinberg
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-and-
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-and-
Mr. N. Henry Simpson
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AFTERNOON SESSION
(1:00 p.m.)

ARBITRATOR BEATY: Thank you. We're on the record.

PRESENTATION ON BEHALF OF THE DEFENDANT PRESTIGE FORD

MR. BLUME: Would you tell us your name, please? Oh, I'm sorry. PF -- Prestige Ford, Garland, calls Allen Goodrick. And this is Mr. Goodrick.

THE REPORTER: Mr. Goodrick, if you'll raise your right hand, please.

(Witness sworn)

ALLEN M. GOODRICK,
having been first duly sworn, testified as follows:

DIRECT EXAMINATION...

...[p. 141] on to you. Right?

A. Some information, yes, sir.

Q. All right. Now, let's talk about what that was. Were you provided by Dealer Computer Services with their tax returns?

A. No, we were not.

Q. Were you provided with financial statements?

A. No, we were not.

Q. Were you provided –

A. May I.. may I correct that?

Q. Yes.

A. I have seen a balance sheet.

Q. Okay.

A. Which is a partial financial statement.

Q. Okay. Well, let's - let's be more clear about this. What you got was a balance sheet. Is that your definition of financial statements?

A. No, sir. Financial statements include balance sheet, income statements, statements of retained earnings, cash flow statements.

Q. Okay. And - and all - and none of those you saw except this- this one balance sheet you saw?

A. It was a summary of the balance sheets taken off of tax returns –

Q. Okay.

[p. 142]

A. For a number of years.

Q. Okay. All right. Now, what did you see of the general ledger?

A. We have been provided with what we think are general ledgers through 1999. We can't tell, because there are missing page numbers and we were not given any other documents that we could verify that it was a complete general ledger.

Q. Okay. Were you given the chart of accounts?

A. Yes, sir, I think we have a chart of accounts.

Q. Okay. Would you need the chart of accounts to determine-- decipher the general ledger?

A. Yes, sir.

Q. Am I correct that the chart of accounts is basically a listing by name and then corresponding number of the accounts that appear in the general ledger?

A. That's correct. May I correct -

Q. Yes.

A. - my previous statement?

Q. Yes.

A. There are account titles on the general ledger documents that I have seen.

Q. Okay. Is that a substitute for a chart of accounts?

[p. 143]

A. Well, I don't have a complete generally ledger, no, sir.

Q. Okay. All right. Now, you alluded to missing page numbers. Did y'all accumulate– well, let me rephrase it. The first part of the documents we got were the account revenue -- account revenue code -- account revenue. Sorry. Revenue accounts?

A. I believe that's correct, yes, sir.

Q. And then we got expenditure accounts?

A, Yes, sir.

Q. Okay. Well, when you accumulated them, did you have things that looked like they were missing?

A. I didn't personally do that; another employee in our office did, and that was his conclusion.

Q. Okay. Now, let me ask you if you are familiar with computerized accounting programs.

A. Yes, sir. During my years of experience, I've seen many computerized accounting programs.

Q. Could you give the panel an estimate?

A. It would be strictly a guess, but 25 different systems.

Q. Have you then had to examine the computerized reports that prints out the general ledger?

A. Yes, sir.

Q. Have you in your experience ever seen one that [p. 144] printed out the general ledger in nonsequential pages?

A. Not in my experience, no, sir.

Q. Let me represent to you that Dealer Computer Services has provided us in various documentation the assertion that the general ledger printed out nonsequentially interspersed with other documents. Do you understand what I'm -

A. Yes, sir.

Q. - what I'm describing to you? Have you ever seen an accounting program do that?

A. Not that I can remember, no, sir.

Q. And because you don't have all of the - all the financial statements, have you been able to verify the completeness or accuracy of the general ledger?

A. No, sir. We cannot verify the completeness or accuracy of the general ledger.

Q. If you had been provided the financial information, the financial statements and the tax returns, could you have done that?

A. Yes, sir.

Q. Now, were you asked by me to develop, if you could, your own analysis of what you described as net lost profits for Dealer Computer Services?

A. No, sir. Our engagement called for us strictly to review Ms. Robinson's report....

End of excerpt.

APPENDIX I

AMERICAN ARBITRATION ASSOCIATION

NO. 54-117-00326-98

FORD DEALER COMPETITOR SERVICES, INC. n/k/a DEALER COMPUTER SERVICES, INC.	)
vs.	)
PRESTIGE FORD	)

ARBITRATION - DAY 2
August 7, 2001

TAKEN BY MELISSA PARKHILL
CSR #5354

American Arbitration Association
Excerpted Transcripts - 8/7/01

APPEARANCES

[p. 2]

THE ARBITRATION PANEL:

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Robert A. Gammage. Esq.
Lawrence R. Abramczyk, Esq.

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-AND-

N Henry Simpson, III
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ALSO PRESENT:

Donny Holender
Kelly Hall
Karen Lahrman, Paralegal
Susan Zimmerman, Paralegal
Michael Karkhoff, Prestige Ford

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...DIRECT EXAMINATION

BY MR. ALLEN:

Q. Good morning, Sheri. Would you state your full name, please.

A. Sheri Ann Robinson...

CROSS-EXAMINATION BY MR. BLUME

[p. 153]...D.C.S., and it's the income to these other companies to cover what they did for Prestige Ford?

A. I don't believe it's characterized like that on the general ledger.

Q. Well, I don't care how it's treated on the general ledger. The fact of the matter is that this is an expense to D.C.S. and it pays the money out: right?

A. Again, I wouldn't consider it an expense. I consider it an intercompany transfer along with many other intercompany transfers between all the affiliated companies that we do each and every month.

Q. In addition to these expenses, you did not review other expenses of D.C.S. to determine which of those might be variable, did you?

A. I looked at the costs that were specifically related to the performance of this contract. That's what I looked at.

Q. Okay. My question, though, was you didn't look at the other expenses of Dealer Computer Services, Inc., to determine which of those might be variable costs?

A. No, I didn't.

Q. Okay. So that means that of the expenses that are variable costs with respect to D.C.S., you didn't look at these two factors, and you ignored that one; [p. 154] right?

A. I wouldn't say I ignored it.

Q. Well, you knew about it but you didn't put it in your calculations so you ignored it.

A. I considered it and felt it was irrelevant because I was looking at the cost related to the performance of this contract.

Q. Well, it's a cost associated with this contract, isn't it?

A. I don't consider it, no.

Q. Well, let's go back to our Services company over here. They're performance services for Prestige Ford, and the money they get is a piece of D.C.S.'s action, so to speak; right? And that's a cost associated with U.C. Services performing work for Prestige Ford?

MR. ALLEN: Well, I'm going to have to object. Number one, there is two questions. Number two, he's just arguing with the witness. And number three, we've been over this.

MR. BEATTY: Well, to the extent it's a compound question, I'll going to sustain it. But I'm going to allow him to ask the questions one at a time.

Q. (By Mr. Blume) All right. Let's do this: U.C. Services presumably performed some services for [p. 155] Prestige Ford, right?

A. That is correct.

Q. And its method of getting paid is through the agreement with Dealer Computer Services, Inc. right?

A. That is correct.

Q. Okay. So that means that that cost of U.C. Services performing its services is associated with the Prestige Ford contract?

A. I'm not sure I understood that question. Can you say that again.

Q. Universal Computer Services' performance of services for Prestige is associated with the contract, correct?

A. Yes.

Q. And that means that this payment is associated with the contract because the income that is coming in is based on that contract and it's now going over to U.C. Services?

A. The money is transferred over to U.C. Services.

Q. Okay. So that means this whole transaction is directly associated with the contract with Prestige Ford?

A. It's based on revenues billed off the contracts.

[p. 156]

Q. And it's further based on services performed by these other sister companies for Prestige Ford, correct?

A. Yes.

Q. Okay. So by contrast to this, what you did do, just to be clear about this, is you looked at costs that were incurred by other companies and attributed them in your report; right?

A. That is correct.

Q. Which means that if we were instead going to look merely at Dealer Computer Services, the claimant, we don't have the information on all of these variable costs because it's not in your report?

A. I didn't believe that those costs were relevant. I included the costs - the accounting records for the costs that I did include in the report.

Q. Okay. I wasn't clear with my question. And I apologize.

This information is not in your report?

A. That is correct.

Q. All right, Which means that if we wanted to take the information that you gave us and reformulate it for Dealer Computer Services, Inc., we don't have the raw materials in your report to work with, do we?

A. I'm not sure if I agree with that. Maybe I...

End of excerpt.

APPENDIX J

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[Dated August 2, 2001]

Mr. James D. Blume, Attorney at Law
Blume & Stoddard
Expressway Tower, Suite 250
6166 North Central Expressway
Dallas Texas 75206

Re: Ford Dealer Computer Services, Inc., n/k/a Dealer Computer Services, Inc. vs. Prestige Ford, American Arbitration Association, 54-117-00326-98.

SUPPLEMENTAL REPORT ON ANTITRUST

Dear Mr. Blume:

This letter is a supplemental report to my report of October 25, 2000, and to my deposition volumes 1 and 2.

My assignment in this supplemental report is to specify my interpretation of antitrust tying arrangements and resultant damages in this case and to explain the bases thereof in the documents produced thus far. I also Include some rebuttal comments.

Letter from Allen Self to James Blume, Supplemental Report on Antitrust - 8/2/01

Section 1.--Tying Hardware to Software

In my earlier report of October 25, 2000, I explained the tying arrangement between hardware and software in this case.

By the terms and administration of the contract, DCS required Prestige to buy computer hardware from DCS at prices far above fair market prices, even when such hardware was readily available from the same manufacturers at much lower prices. Thus, the hardware products and their costs were tied to the software products, in blunt and raw confrontation of federal and state laws that forbid such tying when it results in antitrust law violations. The public suffered damages because Prestige Ford was forced to charge its customers more for its products and services sold in the North Texas market. As we have seen by testimony on both sides, this was no trivial matter, since the overcharges amounted to several hundred thousand dollars in that North Texas market alone, and much more nationwide.

Even Dr. Sibley, the antitrust expert hired by DCS, admits that there are tying issues involved, on page 51, line 21 of his deposition. Dr. Sibley erroneously attempts to explain the tying arrangement away by suggesting that "a deal is a deal" once the contract is signed. If this were indeed the escape hatch for antitrust violators, few cases would ever reach trial. Certainly public policy forbids contracts that are in violation of the law.

In essence, DCS used its monopoly power in the North Texas market, at the time that the initial contract between

DCS and Prestige Ford was signed, by tying its hardware sales and "maintenance" charges to its access to information and data about Ford products. By doing so, it was able to charge monopoly prices and to gain monopoly profits. This can be deduced from the woefully-incomplete accounting and financial data that were produced, responding only partially to the arbitrators' clear orders.

For example, the comparative balance sheet data provided on DCS shows that income statements were regularly prepared. Any beginning accounting student knows that certain balance sheet accounts interact with the income statement. Therefore, one cannot change many balance sheet accounts without postings from the income statement accounts that are maintained as part of the general ledger program.

Asset costs on the balance sheet (for example, computer hardware costs) become the basis of depreciation expense charges on the income statement. While some of these depreciation charges are shown on the general ledger detail printout provided by DCS, there is no way to tell what the monthly depreciation charges are based upon, either in terms of its original cost or the estimated useful like adopted for depreciation. Ordinarily, the financial statements would show that information, either individually by separate account or for groups of similar equipment.

Another area where the balance sheet interacts with the income statement is in the net income and retained earnings accounts. Typically, the retained earnings account on the balance sheet reflects the sum of the yearly net income after federal taxes (NIAT) less dividends paid to stockholders. Here

is where the DCS balance sheet tells an interesting story of high profitability and massive extractions of cash payments as dividends to stockholders. This kind of balance sheet accounting cannot take place without interaction with the income statement. That is how the world can tell that DCS is holding back financial data that it does not want to disclose to its adversary in this proceeding.

And why is DCS withholding financial data? Because, in my opinion, DCS executives know that their damages may wen be limited to net profits lost. If there is no net income on the corporation's income statement, then there is no loss. What DCS appears to be doing is covering up its profitability (and lack thereof) by providing misleading and incomplete general ledger detail and balance sheet data. And, they are hoping that the panel will award damages based upon that incomplete and erroneous data provided.

Still another dead giveaway of stonewalling the arbitrators' production orders is the clear gap in the general ledger accounts: THERE IS NO CASH ACCOUNT, SHOWING DEBITS AND CREDITS BY ACCOUNT. This means that there is no way to trace cashflows, capital expenditures (for equipment, for example), upstream dividends, income tax payments or Texas franchise tax payments, or many other truly significant matters highly germane to this proceeding.

Contracts such as those in this dispute enabled DCS to maintain its monopoly position for products and services that would otherwise have been accessible in a competitive market. Since Ford Motor encouraged its dealers to sign

contracts with DCS, dealers were at first slow to discover that they were being misused by Ford Motor and DCS by the monopoly pricing. Without those monopolistic contracts, dealers like Prestige Ford would have immediately been able to reduce their costs to a competitive market level. DCS still wants its supercashflow from dealers like Prestige Ford. To maintain that monopoly position, it has persisted in failing to disclose the true nature of its financial operating data and its financial condition. In my experience, this is the only time that a participant in an antitrust proceeding has been allowed to cover up its financial operating and condition data by filing incomplete statements and incomplete general ledger detail.

This failure to produce financial data has left me with only one alternative: calculate the antitrust damages using only the best evidence available.

Section 2. – Antitrust Specifications

Each of the charges for the tied hardware is specified in the contract and its supplements.

The tied charges are clearly excessive, as cited in the report of Mr. Daley. When coupled with the unconscionable charges for hardware "maintenance" (where there is no record of any maintenance being performed at all, by DCS' own admissions) the price of the hardware tied to the software was far in excess of fair market pricing.

A possibly confusing element in the contract documents is the use of discounts on hardware, but it is clear from careful examination of the contract and its amendments that all and

more of the discounts were quickly recovered from the monthly hardware "maintenance" charges.

Reality is: Charges for hardware include both a stated invoice price and a hardware maintenance price. Together, these constitute the full price of hardware. One is the "down payment," and the other is the "monthly installment."

There is no evidence that any of the hardware was "maintained." In fact, the DCS documents and executives all deny that any such records are kept, which would go far toward proving the profitablilty of the hardware charges.

The hardware charges are clearly the price of the tied product. Prestige Ford was required to use the Ford DCS software and was required to use the DCS hardware at prices far above the market price of such hardware, even considering the possibility that the exclusive chips were claimed as necessary for communication with the DCS mainframe.

Section 3. – Antitrust Damages to Competition

First, antitrust damages to the public and competition cannot reasonably be denied, even when financial data has been withheld to obfuscate this element. When hardware is marked up at least twice and is then bundled with a monthly so-called "maintenance" charge that has NO financial justification other than vague payroll data, one can see why this is such a monopolistic pricing overcharge – precisely the abuse that the Clayton Act was designed to prevent.

If the abusive contract had allowed Prestige to buy at a competitive price on the open competitive market, Prestige could have acquired its own hardware at a significantly lower cost. Its higher cost of hardware from DCS is clearly the antitrust damages.

If DCS had provided the general ledger detail that it was ordered to provide, the panel would have been able to see exactly how large this overcharge in fact was. DCS has concealed this information, making precise calculation impossible.

Prestige pricing had to be higher because of these added costs, and the added costs had to be paid by consumers of automobiles within its market, by the amount of the overcharges occurring as a result of the tied product overpricing.

Section 4. – Antitrust Damages to Prestige Ford

Measure of damages is the amount of the overcharge above fair market competitive pricing.

Ordinarily, we would calculate such damages by examining the cost of the hardware to DCS and comparing that cost with the price charged to Prestige Ford. That cannot be done here because of lack of information. DCS has not revealed its costs, clearly by design in an attempt to make such a calculation impossible for me or any other expert to perform properly.

Depreciation charges in the general ledger detail printout show that such records were indeed kept. But the general ledger pages produced do not show either initial cost or years of estimated life, which form the basis of that monthly charge.

Another consideration is the DCS cost of providing both hardware and software maintenance. DCS claims, in several responses, that it does not maintain such records by customer, and therefore cannot calculate what the cost savings would have been if they had "lost" the Prestige business.

Section 6. – Accounting Tabulation of Damages

The accounting procedure that I had adopted for the calculation of damages is as follows:

(1) Tabulate the charges for software and hardware, the cost of the hardware provided, and the monthly maintenance charges. Calculate the profitability to DCS of these transactions, which will tend to show the monopolistic pricing in use.

(2) Show the differences between the fair market price charges and the aggregated charges for the tied product hardware over the life of the contract, up to rescission date of end of payments to DCS by Prestige Ford.

(3) This amount constitutes the antitrust damages, which should be trebled.

Letter from Allen Self to James Blume, Supplemental Report on Antitrust - 8/2/01

Unfortunately, DCS' withholding of the needed financial information makes this set of calculations impossible, forcing the adoption of an alternative method.

Section 5A – Alternative Calculation Method

(1) Calculate the total cost to Prestige of the hardware provided by DCS from the initial installation until DCS picked up the hardware.

(2) Estimate the tied-product overcharge as the measure of damages.

(3) Treble that to derive the antitrust damages to Prestige by DCS tying.

As best I can determine, the total net amount paid to DCS by Prestige from 1-93 through 7-00 was $1,114,298, based upon FDCS/DCS Billing re: Prestige Ford – Garland (802415)-4.

According to Sheri Robinson's calculation of damages, Exhibit II, 802415, Detail of Damages, Page 1, Bates #6697, Hardware support revenue on the original contract was $5,447.09 per month, out of a total of $12,883.63, or 42.28% of the total. We will assume that that relationship between hardware and software persisted over the life of the contract. In that case, 42.28% of the net amount billed of $1,114,298 amounted to $471,116 for hardware.

Further, we can reasonably assume that at least half of that charge was above market price, representing the monopolistic

overcharge by DCS for its hardware and maintenance above fair market value. This overcharge is $235,558.

Trebled, this amounts to $706,674, the total amount of antitrust damages due to Prestige Ford, Inc., of Garland from Dealer Computer Services, Inc.

Section 6.– Rebuttal of DCS Sheri Robinson Supplemental Report

Ms. Robinson's use of averages to allocate expenses presumably incurred in the Prestige account is fraught with errors and difficulties.

(1) First, the report is so global in its assumptions that it lacks the precision necessary to justify damages claims.

How do we know that job titles conform to activities? In other words, any set of duties could be assigned to a bench technician. All could be involved in initial setups, without any maintenance responsibilities. Conversely, all could be involved with maintenance, along with many others. Mere allocation by percentage lacks specificity sufficient to justify and explain costs and damages.

It continues to be difficult to believe that DCS would not track the profitability of its customer accounts.

(2) Second, damages should be calculated to show only lost net profits, which she ignores as a criterion. Instead, she tries to claim that personnel salaries are a fixed cost; this flies in the face of what is happening in corporate layoffs today.

(3) Third, she simply doubles personnel costs in an offhand attempt to show "burden" or "overhead," when such data are surely available to an in-house "expert" like her. The Daubert standard forbids experts to just pull numbers out of the air, and that is what she has done in this instance.

Section 7.– Rebuttal to DCS' Antitrust Defense Brief

I was provided on August 1, 2001, with a copy of the antitrust portion of the brief by Mr. John Allen, including Section 4. – Antitrust Claims, paragraphs 36 through 50.

I will answer paragraph by numbered paragraph.

Paragraph (36). In my opinion, Prestige's antitrust claims are not frivolous or even imprecise. DCS did indeed have market power at the 81% level at the inception of the contract. DCS did tie hardware to software by contract provisions.

(37) DCS tied its sale of hardware to its monopoly market position in its software. DCS clearly had sufficient market power over its software, aided by Ford, to restrain competition in the market. Overall, many millions of dollars of interstate commerce were affected. Here again, this cannot be tabulated because DCS withheld the financial information necessary.

(38) The rule of reason required under Jefferson Parish for a Section 1 Sherman Act violation is simple and explicit: DCS had significant market power (81% of the Ford dealers nationwide and 77% of Texas dealers), DCS acted with anti-

competitive intent in tying hardware to software, and its overcharges show that its conduct had an anticompetitive effect on the market for hardware, since it effectively barred other hardware suppliers with national markets from selling to Prestige.

(39) and (40) Dr. Sibley's report did not show that the market power of DCS when the original contract was being negotiated was overwhelmingly monopolistic, owing to Ford's consorting agreement with DCS, its favored supplier. The relevant time for considering the monopolistic market power in is the time when Ford sold FDCS to DCS and when DCS negotiated its contract with Prestige. It appears that Ford relaxed its efforts on behalf of its favored supplier when its $103 million purchase price was paid off.

(41) and (42) It seems clear that Ford can and did influence its dealers to contract with DCS, even without an explicit threat. The relative economic power of Ford (and DCS) over a dealer like Prestige is enough to be powerfully persuasive. As I have said before, one does not have to be orally threatened when a gun is put to one's head. The gun of high economic power is enough to coerce and influence a comparatively small buyer.

(43), (44), (45) and (46) Hardware was sold as an individual trademarked (TI, IBM and others) product by DCS to Prestige and other dealers. Its modification was simply a serial-numbered password method to restrict dealers from using their own hardware. Software licensed by DCS was universally adaptable to IBM-type computer or clones. Hardware and software were clearly not single products. A

wholly separate set of demands can easily be seen in the hardware market. All I saw in Ford dealers' computer rooms and on desktops were standard hardware market computers and peripherals. Since the PC Attach function has been installed in such systems, a user can buy his own PC. When IBM was required to un-bundle its software and hardware, this matter has been well settled in this industry.

(47) Prestige is basing its antitrust claims on conditions that prevailed when the original contract was being negotiated, when DCS clearly had an 81% market share, sufficient to exercise monopoly power.

(48) Prestige has not ignored alternatives in the market. Indeed, when DCS services became unpardonably unsatisfactory, it moved its business to a satisfactory supplier, R & R. Damage to competition is inherent in the tying contract for hardware and software.

(49) DCS has resolutely refused to provide the economic and market data, combined with its financial data, that would otherwise have allowed me to show more precisely what its economic impact has been on this market. Refusal to produce documents should not be a defense in cases like this. A simple examination of the market, the restrictive monopolistic contract, the existence of two separate products, and intimate knowledge of the way DCS works its customers should be enough to establish antitrust violations here. Thus, in my opinion, antitrust violations of a repeated nature helped to sour the relationship between DCS and Prestige. DCS should pay damages incurred by its antitrust practices. In my

opinion, this is the most egregious case of antitrust tying that I have ever encountered.

Section 8.– Final Economic Opinion Summary

In my opinion, damages from antitrust tying violations by DCS in its contract with Prestige Ford are:

$706,674, payable by DCS to Prestige Ford.

Respectfully submitted,

/s/ _____

Allen Self, Ph.D.
Consulting Economist
August 2, 2001

APPENDIX K

AMERICAN ARBITRATION ASSOCIATION

[Dated December 1, 2000]

Re:	54 117 00326 98	)
	Ford Dealer Computer Services, Inc.	)
	n/k/a Dealer Computer Services, Inc.	)
	and	)
	Prestige Ford	)
		)

FOURTH ORDER CONCERNING DISCOVERY

Having read the Respondent's Motion to Compel Third Request for Production and Claimant's Response thereto, and having heard arguments from both sides in this matter in a conference call held on November 29, 2000, the Arbitrators make the following rulings regarding the requested production:

1. Texas State Franchise Tax Reports for DCS from 1993 Through the Present. This request is denied.

2. Complete General Ledger and Chart of Accounts of DCS. Claimant shall produce the expense portion of the general ledger in a format consistent with its earlier production of the revenue portion of the general ledger for 1993-1999, together with the relevant Chart of Accounts.

3. Number of Dealers Who Purchased or Traded 7000 or Dealer Management Systems from DCS for 1993 to the Present. Claimant indicates that the information has already been produced and will direct Respondent to that information, or will produce it if it has not already been produced.

4. Incentive and Commission Plans for DCS Employees. Claimant shall provide the percentage incentive for contract extensions.

5. Copies of Exhibits 3, 4 and 6 of the Purchase Agreement. Claimant has already produced these documents. C.F. Bates Stamp Nos. 1255-1423 (Ex.3), 1249-1254 (Ex.4), and 1161-1218 (Ex.6).

6. Documents Referenced in David Sibley's Deposition. To the extent documents relied upon by Mr. Sibley in forming his opinion have not been produced, Claimants will produce them.

7. Specific Billing Records. Claimant indicates that hourly billing records exist only for service calls outside the coverage of the contract. Claimant shall produce any and all such billing records to the extent they exist.

8. Invoices Regarding Hardware and/or Software. Claimant shall produce that information.

9. Protective Order. Documents, information and material produced pursuant to this order will be

subject to the Agreed Protective Order entered in this case in March 2000.

Dated: December 1, 2000

/s/ _____
Robert A. Gammage

/s/ _____
Michael L. Beatty

/s/ _____
Lawrence R. Abramczyk

APPENDIX L

AMERICAN ARBITRATION ASSOCIATION

CASE NO. 54 117 00326 98

[Dated November 28, 2000]

FORD DEALER COMPUTER SERVICES, INC., n/k/a DEALER COMPUTER SERVICES, INC.	)
v.	)
PRESTIGE FORD	)

PRESTIGE FORD'S SECOND AMENDED COUNTERCLAIMS

Prestige Ford ("Prestige") complains of Ford Dealer Computer Services, Inc. n/k/a Dealer Computer Services, Inc. ("DCS" or "FDCS") and files this Second Amended Counterclaims:

I. Scope of Amendment

These Second Amended Counterclaims embrace all of Prestige Ford's prior counterclaims, including supplemental counterclaims and the separately stated antitrust counterclaim. It provides in one document all of Prestige Ford's counterclaims against DCS.

II. Fact Statement

A. In December of 1992, Universal Computer Consulting Holding, Inc. ("UCCH") and Dealer Computer Services, Inc. ("DCS", soon to be changed to Ford Dealer Computer Services, Inc. "FDCS") executed a purchase agreement with Ford Motor Company ("Ford") to purchase the then existing Ford-owned dealer computer services division which provided computer services to Ford dealers. In January of 1993, Ford and FDCS entered into a licensing agreement wherein FDCS was authorized to use the Ford blue oval logo for the purpose of promoting its products and services. FDCS was also allowed to use the telephone number and physical address of the formerly owned dealer computer services division of Ford.

B. In January of 1993, Prestige Ford, a Ford dealer in Garland, Texas, and FDCS entered into a contract wherein FDCS would provide Prestige with computer hardware and software services, including maintenance. The computer system utilized by Prestige Ford was sold to them by Ford. At the time of the contract between Prestige and FDCS in January of 1993, Prestige was wholly unaware that a sale of Ford's dealer computer services division had occurred. When FDCS representatives sold the computer system to Prestige, they wholly failed to represent to Prestige that FDCS was not affiliated with Ford and was actually a separate entity. In fact, Prestige recognized these representatives as Ford employees because they were the same individuals that worked for the former Ford dealer computer services division -- using the same address, telephone number, and the distinctive blue oval Ford trademark on their FDCS business cards.

C. At the time Prestige entered into the January 1993 contract with FDCS, it was represented to Prestige that the system it was purchasing was "state of the art." In fact, the system was a "home built" hybrid system assembled by FDCS and called the "FDCS 7000." The "FDCS 7000" consisted of an IBM PC CPU using the P/S 2 architecture and equipped with an IBM P/70 card which allowed the PC CPU to read programs designed for an actual IBM mainframe computer. Far from being the "state of the art", the FDCS 7000 was already obsolete at the time of sale. The P/S 2 architecture on which the FDCS 7000 was based was completely abandoned by IBM shortly thereafter.

D. In January 1993, it was represented to Prestige by FDCS representatives that the installation and transfer of data from the former Ford computer system to the FDCS computer system would be simple and immediate. The installation of the FDCS computer system actually did not occur until April of 1993. The conversion of data from the former Ford system to the FDCS system was not simple, and in fact, was a disaster. The FDCS system undervalued the parts inventory of Prestige by approximately $200,000.00 which resulted in a costly write-off by Prestige. Prestige made numerous requests to FDCS to correct the discrepancy in Prestige's parts inventory database, but FDCS adamantly refused. Subsequently, Prestige conducted a physical inventory of its parts department and discovered that the parts were actually there. This resulted in the loss of sales time for Prestige's Parts Department employees.

Another data conversion problem caused the loss of vehicle service repair records which were in existence prior

to the installation of the FDCS computer system. The loss of vehicle service repair records resulted in Prestige not being able to access the prior vehicle service history of customers who, after the installation, had further repairs conducted to their vehicles. The service advisors at Prestige had to physically access paper records to obtain previous service history for customers, which resulted in a loss of hundreds of man-hours and caused customer dissatisfaction.

Within three months of the installation of the FDCS computer system, Prestige had to purchase additional hard drives from FDCS because the initial system did not have enough memory to support the data generated by Prestige. Even though FDCS did not perform a needs assessment, however, FDCS affirmatively represented to Prestige that the initial system was more than adequate for the size of its dealership and the volume of sales and service it performed. This was another misrepresentation by FDCS representatives.

E. The FDCS computer system was represented to Prestige as not only "state of the art" but as having a high speed processor. In fact, the FDCS 7000 system did not have enough memory or storage to adequately handle the data processing and retention needs of Prestige. Over the course of Prestige's contract with FDCS Prestige experienced tremendous growth. The added storage and memory which was necessary due to its expansion actually slowed the speed of the FDCS computer system to a crawl. For example, in order to print a parts report, the parts and service director would initiate the protocol to print the parts report and "go get a cup of coffee" because he knew the report would take a

long time to print. This was yet another misrepresentation by FDCS representatives to Prestige.

F. The FDCS computer "desking" software (which was used to compute pending car sales at the sales desk) did not perform as was represented by FDCS. Because the FDCS desking software did not work, Prestige had to purchase an additional stand-alone desiring system which would not interface with the FDCS Finance and Insurance software. This forced Prestige to purchase an additional computer system, from another vendor, which performed the desking function that the FDCS should have already provided. This was yet another misrepresentation by FDCS representatives to Prestige.

G. The FDCS Management software application did not perform as represented by FDCS representatives. In fact, the previous dealer/principal of Prestige had the software uninstalled because it did not provide any information which was of use to management. This was yet another misrepresentation by FDCS representatives to Prestige.

H. The FDCS Parts Control software application would not always produce the necessary data requested by service advisors and technicians. The application was unstable and unreliable. This was yet another misrepresentation by FDCS representatives to Prestige.

I. The FDCS Service Inventory application did not work well as the storage on the FDCS system was inadequate. This was yet another misrepresentation by FDCS representatives to Prestige.

J. The FDCS 7000 system was not capable at downloading applications to a PC, which was inefficient and was uneconomical. For example, the service director attempted to revise a report using an Excel program, but could not download and manipulate the data from the FDCS system. This was another example of the FDCS system not being user-friendly and able to meet the needs of Prestige. This was yet another misrepresentation by FDCS representatives to Prestige.

K. In order to operate the FDCS system it was necessary for Prestige employees to travel to Houston, Texas, to attend classes on how the FDCS system operated. One of the numerous Prestige employee complaints was the lack of qualified instructors. The FDCS instructors did not have any knowledge regarding how car dealerships operate and were apathetic and unconcerned when asked questions by employees on how applications could help them to perform their duties more efficiently.

L. Prestige was compelled by Ford to purchase the FDCS Computerized Parts Display ("CPD") When Ford phased out its microfiche system that had previously been standard in the industry. FDCS was the only provider of the CPD and Prestige had no choice but to purchase it from FDCS.

M. Prestige was compelled by Ford to purchase the FDCS Vehicle Inventory Locator service from FDCS when Ford gave FDCS a ten-year exclusive right to provide this service to all Ford dealers. During this arbitration Prestige was paying FDCS for this locator service. However, FDCS cut off Prestige's vehicle inventory locator service in May of 1999

and continues to refuse, to this day, to reinstate the service to Prestige.

N. The unreliability of the FDCS computer system caused numerous and costly problems for Prestige. For example, the system was down at one time for a period of three days. It took Prestige employees six days to recreate the data that was lost during this three day downtime. In addition, FDCS service technicians were continually visiting Prestige for repairs to the system and the technicians were notoriously slow to appear to service the FDCS problematic equipment. In addition, Prestige employees had to back-up the system on a daily basis due to known habitual failure of the system.

O. FDCS representatives represented to Prestige that the cost of the FDCS hardware and software were competitive and reasonable, when, in fact, they were not. Hardware was sold at consistently inflated prices many times its fair market value. Maintenance charges by FDCS on both hardware and software were grossly over inflated above the competitive market price. Prestige paid FDCS approximately $16,000 per year to service its system when service on a similar system by IBM would have cost no more than $500 per year. The cost of FDCS new software applications was not competitive with comparable software available in the marketplace. Its lack of competitiveness is driven by DCS' insistence on maintaining a "closed architecture" to its systems as opposed to the state of the art "open architecture" used by DCS competitors.

P. FDCS represented to Prestige that its system was a stand-alone computer system, when upon investigation in 2000, Prestige discovered that the system is actually nothing

more than a "smart terminal" needing a remote processor. As an example, when the system was physically being moved to another location, FDCS called Prestige's system administrator and demanded that he immediately restore the telephone connection to the computer. FDCS' explanation for this necessity of a phone line is that it is a security measure. In actuality, the FDCS 7000 cannot function for extended periods of time without the remote updating of master files by FDCS on its own IBM main frames. This remote processing was to the benefit of Ford which had access to a dealership's data without the knowledge or consent of the dealer.

III. Cause of Action One: Breach of Contract

The actions of FDCS constitute breach of contract in the following respects:

A. FDCS failed to properly evaluate the parts inventory and convert its prior data. This action damaged Prestige in the amount of $200,000.00. FDCS also failed to properly convert the service department histories causing Prestige to lose all of its historical service data.

B. FDCS failed to provide a dealer management system that properly functioned. It was often out of service or had continuous hardware failures. FDCS failed to properly and timely maintain the hardware and software. The system was slow and unresponsive. FDCS failed to take any action to remedy Prestige's continuous complaints about its reliability.

C. FDCS breached the contract by charging unconscionable hardware prices. These prices were many times in excess of the fair market value and much higher than prices from other vendors.

D. FDCS breached the contract by refusing to provide vehicle locator services to Prestige. FDCS is the sole provider of vehicle locator services by virtue of a monopoly granted to it by Ford Motor Co. FDCS is contractually obligated to Ford to provide these services to any dealer who is technically capable of receiving them: FDCS provides these services even to dealers who do not have their dealer management software. Nonetheless, FDCS has refused to provide vehicle locator services to Prestige. Prestige has been damaged by having lost sales as a result of not having vehicle locator services.

E. FDCS breached the contract by failing to negotiate in good faith prior to making a claim for arbitration as required by the contract.

F. Prestige seeks the following contract damages:

1. $200,000.00, as compensation for the loss of its parts inventory;

2. rescission of the contract; and

3. attorneys fees.

IV. Cause of Action Two: Fraud

The actions of FDCS constitute fraud in the following respects:

A. FDCS perpetrated fraud on Prestige by presenting Amendment NO. 17 to the then dealer-principal, Randall Reed, for signature, when it contained a provision that Prestige had not, and did not, accept. Specifically, it contained a provision which purports to extend, without any consideration, the term of the contract from 50 months to 120 months. This provision was never agreed on and, in any event, fails for lack of any sort of consideration. This provision was inserted by FDCS's staff who prepared the amendment. The FDCS staff did so because, among other reasons, FDCS gave substantial financial incentives to its sales personnel for such contract extensions.

B. FDCS represented to Prestige, as well as all other dealers, that it was providing an IBM Model 9370 main frame computer or its equivalent. FDCS maintains that the "FDCS 7000" computer is "equivalent to an IBM Model 9370, series 30." In fact, the FDCS 7000 is nothing but an IBM PC powered by an Intel 40686, with an IBM P/70 card which allows it to read programs written for a Model 9370. The PC CPU uses IBM's obsolete P/S 2 microchannel architecture. The system operated as a PC, using PC based peripherals. The FDCS 7000

system was unable to perform the tasks for which it was originally sold to Prestige.

C. FDCS represented to Prestige, as well as all other dealers, that it was providing a "stand alone" "in house" computer system. In fact, the "FDCS 7000" was completely dependent on FDCS for outside processing. Data was exported to FDCS's main frame, which was an actual IBM 9370, for remote processing. The data was then sent back to Prestige's system. This resulted in Prestige not having a stand alone system, as represented. It also resulted in FDCS having access to the daily data of every dealer who had an FDCS 7000 system. This data was used by FDCS to formulate a "parts locator" data base which was resold to the dealers. It also gave access to FDCS's patron, Ford Motor Co., of this dealership data without the dealership' s knowledge or consent. Ford, acting through the Technical Committee created at the time of sale by Ford to FDCS, reviewed and approved the architecture and price of the FDCS 7000 computer.

D. FDCS misrepresented the capabilities of its hardware. As the system speed continued to slow, FDCS continually advised Prestige to add hard drives or related peripherals. Now that the architecture of the "FDCS 7000" is known, these recommendations would have, and did have, the effect of further slowing down system speed capabilities. FDCS misrepresented both the capabilities of the system and the appropriate upgrades in order to sell additional

hardware at unconscionable prices or to extract further contract extensions. In the case of Prestige, it was induced to purchase, among other things, additional hard drives at the unconscionable price of $12,000.00, when the contemporary fair market price was, at most, $1,600.00.

E. Prestige requests as its damages for the fraud of FDCS, that the contract be rescinded, or, in the alternative, that the panel find the contract expired after 60 months as the parties agreed.

V. Cause of Action Three: Antitrust

A. Nature of Action

1. As set out below, DCS has violated the antitrust laws of the United States and states therein by engaging in illegal tying arrangements. Its anti-competitive conduct (a) has suppressed competition in the United States, in the State of Texas and in other states for Ford Motor Company ("Ford") sponsored and approved computer services, information, hardware and software, and (b) has permitted DCS to overcharge Ford dealers, such as Prestige, for computer services, information, hardware and software.

2. Prestige has purchased computer services, information, hardware and software (collectively "the DCS products") directly from DCS for vehicle and parts locator and other services in connection with the sale of Ford Motor Company motor vehicles, parts and services. DCS's anti-competitive conduct, in concert and conspiracy with non-party

co-conspirators, has injured Ford dealers, including Prestige, both by requiring them to pay DCS monopoly prices for the DCS products and by preventing them from paying competitive prices to competitors of DCS.

B. Parties

3. Prestige Ford. Prestige Ford is a Ford dealer in Garland, Texas, a suburb of Dallas, Texas. It is the largest volume Ford dealer in Texas and currently ranks number 5 in total sales among all Ford dealers throughout the United States.

4. DCS. DCS is a computer company located in Houston, Texas. Dealer Computer Services was originally a wholly owned subsidiary of Ford Motor Company ("Ford") in part to provide computer services to Ford dealers. In January of 1992 Ford sold Dealer Computer Services to Universal Computer Systems, Inc. ("UCS") in Houston, Texas. DCS is a sister company of UCS with a common parent which is Universal Computer Consulting Holding, Inc. DCS operated from 1992 through 1997 under the Ford-authorized name "Ford Dealer Computer Services" ("FDCS") and used Ford's distinctive blue oval on business cards, stationary, contracts with Ford dealers, brochures, advertising, and other documents.

C. Non-Party Co-Conspirators

5. Prestige's sales and leases of motor vehicles and motor vehicle parts and related information services depend largely on the nature and quality of Ford's products and, also, on the

nature and quality of Ford sponsored and approved computer services, hardware and software, such as the DCS products. To eliminate and unfairly and/or unreasonably restrain competition for Ford-sponsored computer services, hardware and soft-ware within Prestige's geographic market area, DCS and certain non-party co-conspirators continuously and without interruption have combined and conspired together to enable DCS to enter into -- and to coerce Prestige to enter into -- contracts for the DCS products. In so doing, both DCS and its non-party co-conspirators have perpetrated and continue to perpetrate upon Prestige an unlawful tying arrangement requiring that Prestige pay for and use DCS products in order to obtain Ford motor vehicles, motor vehicle parts and related information services.

D. Applicable Law

6. Pursuant to Section 4 of the Clayton Act, 15 U.S.C. §§ 15, this action is for damages or, alternatively, for rescission of contract arising out of tying arrangements in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, § 3 of the Clayton Act 15 U.S.C. § 14, §15.05 of the Texas Free Enterprise and Antitrust Act, the laws of the State of Texas and the laws of the State of Michigan.

E. Statement of Facts

Trade and Commerce Affected

7. At all times pertinent, DCS has been in the business of selling computer services, hardware and software and leasing

computer hardware and software in the United States and in the State of Texas.

8. The conduct of DCS has affected the United States and states therein, including Texas and Michigan, and has affected interstate trade and commerce in the business of selling, leasing, and servicing computer services, hardware and software in the relevant markets, set forth below.

F. Relevant Product, Service and Geographic Markets

9. The relevant product markets are Ford-sponsored computer services, information, hardware and software as sold or leased to Ford dealers. The geographic scope of competition in these relevant markets (relevant geographic market) is the following counties in the State of Texas: Dallas, Tarrant, Denton, Collin, Rockwall, Kaufman and Ellis.

G. The Anti-Competitive Effect of DCS' Policies and Practices

10. At all relevant times herein: Ford requires that DCS be, and DCS is, the sole provider of vehicle and parts locator services for Ford and its Ford dealerships. DCS, with the consent, knowledge and/or acquiescence and assistance of Ford, perpetrated the following overt acts in purporting to be affiliated with and act for Ford to force the sale of DCS products:

A. FDCS/DCS/UCS use of the well-known, oval Ford logo on business cards, contracts, letterhead, parts billing statements, and other documentation.

B. FDCS/DCS/UCS use of the Ford name in the FDCS/DCS/UCS corporate name: Ford Dealer Computer Services.

C. FDCS/DCS/UCS use of Ford Motor Company's address and telephone number in Southfield, Michigan on business cards, letterhead, invoices, credit memos and other business documents.

D. Elements of the contracts used by FDCS/DCS/UCS contain elements of the Ford Motor Company contracts with its dealers, such as venue in Michigan; arbitration in Michigan; and application of Michigan law. FDCS/DCS/UCS's actual physical address is in Houston, Texas.

DCS is not a subsidiary of Ford, but still uses Ford Motor Company's parts billing statements to collect its fees from Ford dealers. Ford has designated DCS as its "preferred vendor." Likewise, until very recently, Ford forcefully encouraged its dealers, including Prestige, to use DCS products/services as provided in the January 28, 1993 contract between DCS and Prestige.

11. Through its anti-competitive practices, DCS intended to make it more difficult for its competitors to provide relevant products and services to Ford dealers, including Prestige, at competitive prices. DCS succeeded. DCS's

policies and practices had a substantial anti-competitive effect. Ford dealers, including Prestige, were deprived of price-competitive computer services, information, hardware and software.

H. Injury to Competition

12. DCS's exclusionary conduct has substantially increased the prices paid both by the Prestige and other Ford dealers for computer services, information, hardware and software above the competitive levels that would otherwise prevail in the relevant markets. DCS's conduct is part of a policy to prevent price competition in the relevant markets and to charge monopoly prices to Ford dealers such as Prestige. For example, in 1993, Prestige paid $70,000 to DCS for its computer hardware system when, in fact, the fair market value of a comparable system with similar capabilities and functions was approximately $30,000.

As a further example, Prestige has paid to DCS approximately $2,500 per month for maintenance services on its hardware system, when the fair market value of the same or similar services in the industry is approximately $250 per month.

I. Causes of Actions

Tying of Sale and Leasing of Motor Vehicles, Motor Vehicle Parts and Services to Contract Products/Services; Tying or Sale of Software and Software Services to Sale of Hardware and Hardware Services

13. All foregoing paragraphs are incorporated herein by reference.

14. Through its tying arrangement practices, DCS and its non-party co-conspirators have "tied" (A) the sale and leasing of Ford motor vehicles, motor vehicle parts and services to the purchase of Ford-sponsored and approved computer services, hardware and software (B) the tying of its hardware products and services to the license of its software products and services and its information services.

15. The DCS products in the relevant markets are separate products from the sale of motor vehicles, parts and services and the lease of motor vehicles. The DCS products can be and are sold separately in different relevant markets. The DCS hardware products and services are separate from its proprietary software and services in the relevant markets.

16. DCS has sufficient economic power in the market for Ford-sponsored and approved computer services, hardware and software products/services to enable it to restrain trade appreciably in the markets for the Ford-sponsored and approved computer services, information, hardware and software.

17. DSC's practices affect a substantial amount of commerce in the relevant product and services markets.

18. DCS's conduct has injured competition and, as a consequence, both Prestige Ford and other Ford dealers in their businesses or property.

19. DCS's tying arrangements constitute a *per se* violation of Section 1 of the Sherman Act, i5 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14. In the alternative, they constitute unreasonable restraints of trade under the rule of reason in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

J. Antitrust Relief Requested

As antitrust relief, Prestige requests that:

A. This Arbitration Panel declare that DCS's conduct constitutes:

(1) illegal tying arrangements excluding and disadvantaging competition in the relevant markets in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and § 3 of the Clayton Act, 15 U.S.C. § 14.

B. Prestige recover its actual damages, in an amount to be determined at trial, and threefold the damages it has sustained, and will sustain, as a result of the antitrust violations alleged herein.

C. Prestige recover its reasonable attorneys' fees and costs.

D. Prestige recover pre-judgment and post-judgment interest on the above sums at the highest respective rates allowed by law.

VI. Attorneys' Fees

As a results of FDCS's conduct as described in Counts One and Three, Prestige Ford is entitled to recover its reasonable and necessary attorneys fees. Prestige has hired the undersigned firms to represent it. Prestige requests that the Panel find the amount of Prestige's reasonable and necessary attorneys fees through the trial of this arbitration proceeding as well as for any appeal to a U.S. District Court under the Federal Arbitration Act.

Prayer

WHEREFORE, Prestige Ford requests the following relief:

A. Contractual damages as set out herein, including $200,000.00 actual damages, rescission of the contract, and attorneys fees.

B. Fraud damages, as set out herein, including rescission of the contract or, in the alternative, a finding that the contract expired on its terms at the end of 60 months.

C. Antitrust damages, including:

This Arbitration Panel declare that DCS's conduct constitutes:

1. illegal tying arrangements excluding and disadvantaging competition in the relevant markets in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and § 3 of the Clayton Act, 15 .U.S.C. § 14.

D. Prestige recover its actual damages, in an amount to be determined at trial, and threefold the damages it has sustained, and will sustain, as a result of the antitrust violations alleged herein.

E. Prestige recover its reasonable attorneys' fees and costs.

F. Prestige recover pre-judgment and post-judgment interest on the above sums at the highest respective rates allowed by law.

G. Prestige be granted such other and further relief as the Court deems just and equitable, including without limitation, rescission of the contract between the parties to the above styled and numbered arbitration proceeding.

Respectfully submitted,

BLUME & STODDARD

/s/ _____

James D. Blume
Texas State Bar No. 02514600
Jennifer S. Stoddard
Texas State Bar No. 19260650
6116 N. Central Expressway
Expressway Tower, Suite 250
Dallas, Texas 75206
214-373-7788
Fax: 214-373-7783

and

Henry N. Simpson, III
Texas State Bar No. 18403700
SIMPSON, WOOLLEY McCONACHIE, L.L.P.
700 The Quadrangle
2828 Routh Street
Dallas, Texas 75201
214-871-5080
Fax: 214-871-5090
Attorneys for Respondent/Counter-Claimant Prestige Ford

Certificate of Service

This is to certify that a true and correct copy of the above and foregoing was delivered via facsimile and U.S. Mail on this the 28th day of November, 2000, to:

John C. Allen
John C. Allen, P.C.
909 Fannin Street
Suite 1225
Houston, Texas 77010

Attorneys for Claimant/ Counter-Respondent Dealer Computer Services.

/s/ _____
James D. Blume
Jennifer S. Stoddard

APPENDIX M

RANDEL C. LOMAX
23505 Crenshaw Blvd.
Suite 100
Torrance, CA 90505

September 17, 2000

Blume & Stoddard
Attorneys and Counselors
Expressway Tower, Suite 250
6116 N Central Expressway
Dallas, Texas 75206
Tel: 214.373.7788
Fax: 214.373.7833

RE: Dealer Computer Services, Inc. v. Prestige Ford

Dear Mr. Blume:

Inspection of the DCS's Damage Analysis Report revealed inconsistent and biased methodologies in the allocation of cost to the computation of net revenues. Additionally, the computation excludes any allocation of on-going software maintenance/development costs. Thus, the profit margin (or damages) claimed by DCS is inaccurate and excessively high. The following report will present a more accurate methodology and define the information necessary to compute the damage claim consistently.

This analysis will be complete upon review of documents produced by Dealer Computer Services, Inc. in the future and any depositions and attachments thereto.

As an Attorney and a Certified Public Accountant, I have practiced in the areas of litigation support and accounting systems analysis and integration. I am also familiar with the software development process and the attendant costs and revenues. A copy of nay resume is attached hereto as Exhibit A.

The basis for this report is the Damage Analysis prepared by Ms. Sheri Robinson as described below.

INTRODUCTION:

The following table presents DCS' claim for damages arising from the termination of its contract with Prestige Ford. The claim is presented in the Dealer Computer Services, Inc. vs. Prestige Ford Damage Analysis prepared by Sheri Robinson of Dealer Computer Services, Inc., Houston, Texas as submitted on November 16, 1999 to Mr. John C. Allen, Esq.

Summary of Damages DCS, Inc.

Summary Item	**Damages**
Total Contract Revenue	$520,499
Total Contract Costs	(75,286)
Total CPD Contract Revenue	174,243

Total CPD Contract Costs	(28,832)
Total Invoices billed; not yet paid	255,983
Due on Outstanding Loans	3,290
Damages before Legal Fees	$849,897
Legal Fees	16,610
Total Damages	$866,507

In this analysis, Robinson asserts that the total damages are composed of Contract Revenues (arising from the Contract and the CPD Contracts, previously billed, but unpaid invoices, loan amounts outstanding) and Legal Fees less only those costs that can be allocated directly to support and repair materials consumed by Prestige.

Robinson's analysis specifically excludes all software development costs on the grounds that:

1) These costs were incurred and expensed in previous periods

2) These costs cannot be directly allocated to Prestige, because DCS incurred substantial costs to develop its single product.

Robinson further asserts that the ongoing costs of providing software services, including programmers, documentation specialists and computer operators are fixed costs. That is, the costs must be incurred to maintain the software product, and

the loss of a single customer (i.e., Prestige) does not measurably reduce the expenditures that DCS must make. So the ongoing software maintenance (which would include salaries for the programmers, operators and documentation staff, administrative overhead and investment in computer hardware and related peripherals for the maintenance of the software) is a prior expense excluded from this damage analysis.

Robinson does include the cost of support personnel (Client, Bench and Field service technicians). However, the costs are allocated to Prestige based on the number of devices (computers, terminals, printers) installed at Prestige (108) compared to the total number of devices maintained by DCS for all its customers (80,262). This allocation is 0.13456% to Prestige. She then doubles the actual salary costs of bench and field service technicians (to allow for overhead, which Robinson claims to be common practice in the software development industry). The cost of Client service personnel is allocated at 4%, based on DCS's experience that one representative is required for every 25 clients. Robinson claims that the support staff keeps no records of daily activities and that it is impossible to determine how much staff time was actually devoted to Prestige Ford.

The cost of repairs/supplies in this analysis is taken directly from the last year's historical experience and projected at that rate over the remaining life of the Contract and the CPD Contract, which covers Amendments 15, 39 and 41, adding a total of 15 devices to the 108 installed.

ASSUMPTIONS MADE BY THE ANALYSIS

Robinson uses actual contract revenues under the Contract and CPD Contract for this analysis. However, in the computation of costs, each of the 80,262 devices counts equally in the allocation method. Thus, under this analysis, a mainframe processor consumes as much support effort as does a printer or a VT-terminal. There is no effort to weight the support costs for those devices that consume significantly more effort and to reflect that weighting in Prestige's hardware configuration. This allocation method smoothes out or minimizes the difference in support efforts for the different devices and creates a skew or bias in its application towards reducing costs. A far more accurate method is to create a weighted average (based on resources consumed) for both the entire set of devices supported as well as those supported at Prestige.

There is evidence in the Contract and the Amendments that the cost of support is different for each device. If this were not the case, we could expect that the cost for monthly support for each device might be the same or a consistent percentage of the purchase price. The monthly support charges for the devices installed at Prestige vary with the type of device and are not related consistently to the purchase price. DCS had some other method of determining how much to charge for each type of device for support.

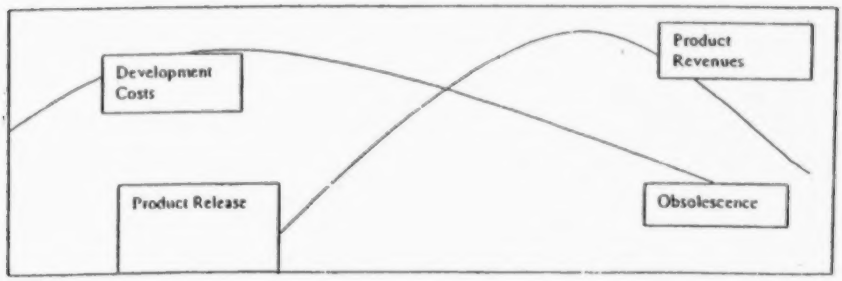
The information furnished in the damage analysis does not contain any breakdown of costs by device. Nor does the analysis specifically list the type of devices supported (other than by Model Number). Given the information contained in

the Damage Analysis, it was impossible to re-compute a weighted average for the devices.

With respect to the exclusion of both prior research and development costs and ongoing maintenance, Robinson argues that these costs are not pertinent to the period covered by tile analysis (the remaining life of the contract plus items unpaid). Furthermore, she claims that the maintenance is obligatory for customers (i.e., updates must be installed). Thus, the ongoing maintenance expenditures are clearly part of the cost of supporting the software and the operating hardware and some allocation of these development costs should be made to the damage analysis. Had the Prestige contracts expired during the period covered by Robinson's analysis, DCS would have been obligated to continue its support provision.

By analogy, Robinson could have taken, the salaries of the 84 programmers, 11 documentation specialists and 16 computer operators multiplied by a factor of 2 for inclusion of overhead and then allocated by the number of devices supported. Unfortunately, no salary data are included in the analysis, so the allocation could not be made.

The profit margins for the Contract and the CPD Contract are over 80% as presented. While profit margins are normally high in the computer software industry, there is substantial risk and competition. However, the methodology presented by Robinson takes undue advantage of the timing of cash flows to unrealistically reduce total costs of providing support. The typical cash flow cycle for software development projects can be represented by the figure below:



While development costs typically diminish after the release of the product, they do not disappear completely during the period of product revenues. After the product release, research and development typically commence on a new version or a new product to augment and/or replace the existing product. These costs must be factored into the computation of profit margin for a product. Since, as Robinson claims, DCS produces only one product for its customer base, the development cost component should be easily isolated from its financial statements. If Robinson excludes prior period development costs, then her analysis must logically include current period development costs.

Also relevant to the proper statement of cost in this analysis is the conversion cost from the TI/UNIX environment to the IBM 9370, which is described fully in the report of Mr. Philip Wierzbicki: The exchange of equipment, the cost of software conversion, testing and installation at customer sites is excluded from the damage analysis.

ADDITIONAL DATA REQUIRED TO COMPLETE THE ANALYSIS

- Financial Statements issued by Dealer Computer Services, Inc. for the period(s) covered by the Damage Analysis and federal income tax returns

- A breakdown of the salaries and overhead expenses of the progammers, documentation, specialists, and computer operators

- A breakdown of the support costs by type of device and the manufacturers and names of the devices comprising the 80,262 devices supported by DCS

- Schedules of the development costs for the period(s) covered by the Damage Analysis

/s/ 9/22/00
Randel C. Lomax

Exhibit A: Resume

Randel C. Lomax

Education & Certificates

Juris Doctor
Southern Methodist University School of Law
Dallas, Texas
May 1998
Graduated with honors *(cum laude)*
Honors: Dean's list Spring 1996, Spring 1997,

Fall 1997, Spring 1998
Activities: Staff, SMU Computer Law Review and Technology Journal, 1996-97; SMU Texas Invitational Mock Trial Team, Fall 1996;
Excelled in legal writing and tax courses.

Attorney at Law
State Bar of California
License #200150, issued January 1999.

Certified Public Accountant
State of California
License #37530, issued May 1983.

Master of Business Administration
Brigham Young University
Provo, Utah
Emphasis: Finance, Marketing

Bachelor of Science
Brigham Young University Provo, Utah
Major: Accounting

Professional Experience

CPA, Attorney at Law
Chad R. Turner & Associates, Torrance, CA (1998 to present)
Practice in areas of tax research, federal and state tax audits, multi-state corporation terminations and withdrawals, individual and corporate tax compliance, human resource matters, etc.

Legal work in matters of trust and estate administration, wills, sale and purchase of small businesses, secured transactions, UCC filings, etc.

CPA, Private Practice
Randel C. Lomax, CPA, 1991 to 1995.
Santa Ana, California
Practiced in areas of litigation support, accounting systems analysis and integration, write-up work, individual tax compliance, and special projects. Wrote MS FoxPro applications for specialized accounting tasks, automating tasks previously performed manually; wrote custom accounting and inventory programs in MS Access. Also specialized in financial troubleshooting. (E.g., investigating and locating causes for low collections on factored receivables.)

Controller
Jetset Tours, Inc. (North America), 1988 to 1991.
El Segundo, California
Responsible for all aspects of complex accounting/finance system for all North American operation, which included offices in major U.S. and Canadian cities. Direct responsibility for staff of 8-10 people in accounting and other departments. Specific tasks included complete annual budget preparation, full responsibility for "Big 5" annual audit, airline revenue verification under differing and highly complex airline commission contracts, establishing and executing accounting procedures, quarterly travel to Melbourne, Australia to report to board of directors, hands-on management of daily accounting department operations. Heavily involved in many

special projects including telecommunications, employee benefit programs, company policy formation, computer systems, software customization, etc.

Accounting Manager
Chad R. Turner & Associates, 1986 to 1988
Torrance, California
Responsible for servicing specific clients in areas of general accounting, taxes, and computer systems and software. Involved in financial audits, compilations and write-ups. Clients were primarily personal service corporations, high income individuals and entrepreneurs.

Controller
Corona Foothill Company, 1983 to 1984
Corona, California
Responsible for all company accounting and finance functions for this citrus production/real estate development firm. Responsible for staff of three in the accounting department. Converted company accounting system from outside ADP general ledger system to in-house computerized G/L, A/P, A/R system.

Staff Accountant
Paul M. Cohen & Associates, 1982 to 1983
Newport Beach, California
Tax planning, research, and compliance for individuals, partnerships, and corporations. Audits and compilations. Accounting system consulting.

Staff Accountant
Arthur Anderson & Company, 1979 to 1981
Costa Mesa, California
Audit department for the first year. Involved in all aspects of auditing and systems analysis for large and medium-sized clients. Entered tax department in the second year. Tax planning, research, and compliance for individuals, partnerships, and corporations.

Skills

- Excellent public speaking and presentation skills.

- Expertise in computer spreadsheets (MS Excel, Lotus), databases (MS Access, FoxPro, dBase) and word processors (MS Word). Have written complex business applications in MS FoxPro and MS Access for employers and clients. Familiar with several commercial accounting programs (State-of-the-Art, QuickBooks, etc.)

- Trained in Westlaw and LEXIS/NEXIS.

Personal Date of birth: 12.24.54. Interests: Running, mountain biking, road biking, scuba diving, reading, movies, music, flying, racquetball, computers.

APPENDIX N

AMERICAN ARBITRATION ASSOCIATION

[Dated August 7, 2000]

Re:	54 117 00326 98 Ford Dealer Computer Services, Inc. n/k/a Dealer Computer Services, Inc. and Prestige Ford	))))))

THIRD ORDER CONCERNING DISCOVERY

Having read Respondent's Motion to Compel *Duces Tecum* Responses and Claimant's Response thereto, and having heard argument in this matter in a conference call held on August 2, 2000, the Arbitrators make the following rulings regarding the subpoenaed documents:

1. Brockman Depositions. Claimant Dealer Computer Services, Inc. ("DCS") shall provide Respondent Prestige Ford ("Prestige") with copies of transcripts of any depositions which were given by Robert Brockman in prior arbitration proceedings between DCS and Ford dealers wherein Brockman testified regarding DCS' computation of its alleged lost profits in the context of breach-of-contract claims made by DCS against said dealers ("the relevant Brockman depositions"). If any of the relevant Brockman depositions was given subject to a confidentiality, non-disclosure or protective order or agreement, Claimant's obligation to

provide said deposition to Respondent is contingent on Respondent first providing Claimant with a written consent from the other parties to the prior arbitration dispute wherein the deposition testimony was given.

It is not necessary for Claimant to provide the entire deposition transcript of the relevant Brockman depositions; rather, should Claimant so desire, Claimant may provide photocopies of only those passages of Brockman's testimony dealing with the hereinbefore-referenced subject of DCS's computation of lost profits.

2. Robinson Depositions and Reports. DCS shall provide Respondent with copies of transcripts of all depositions given by, and/or reports prepared by, expert witness Sheri Robinson in prior arbitration proceedings between DCS and Ford dealers wherein Robinson testified about, and/or submitted as evidence a report regarding, DCS' alleged damages in the context of breach-of-contract claims made by DCS against said dealers ("the relevant Robinson depositions"). If any of the relevant Robinson depositions was given subject to a confidentiality, non-disclosure or protective order or agreement, Claimant's obligation to provide said deposition to Respondent is contingent on Respondent first providing Claimant with a written consent from the other parties to the prior arbitration dispute wherein the deposition testimony was given.

It is not necessary for Claimant to provide the entire deposition transcript of the relevant Robinson depositions; rather, should Claimant so desire, Claimant may provide photocopies of only those passages of Robinson's testimony

dealing with the hereinbefore-referenced subject of DCS's damages.

To the extent it has not already done so, DCS shall also provide Respondent with a copy of Robinson's report prepared for presentation in the instant arbitration, together with Robinson's accompanying notes, file documents and correspondence relating to said report and Robinson's billings to Claimant for services rendered in conjunction therewith.

3. Timetable. Within fourteen(14) days of Claimant's receipt of this Order, Claimant will provide Respondent with a written list of arbitration proceedings wherein the relevant Brockman depositions and the relevant Robinson depositions were taken. The list will contain the caption of the proceedings, the file number, and the names, addresses and (if known) telephone numbers of all parties to each case and their respective counsel.

Within twenty-one (21) days of Respondent's receipt of the foregoing list. Respondent will deliver to Claimant the written consents being required by the Arbitrators as a condition for Claimant's release of the deposition transcripts.

Upon Claimant's receipt of the written consents, Claimant will then forthwith deliver to Respondent the relevant Brockman and Robinson depositions.

4. Six-Year Limitation. Notwithstanding anything herein to the contrary, Claimant is only obliged to produce the relevant Brockman and Robinson depositions for the past six

(6) years, i.e. depositions taken prior August 1, 1994 need not be supplied.

5. Scope of This Order. Because the suggestion was made, during the course of argument of the instant motion, that some (or all) of the Brockman depositions and Robinson depositions and reports may be in the possession of Claimant's counsel of record herein, said counsel will provide such documents as are, in fact, in his possession or under his control.

6. Protective Order. Transcripts of both the Brockman depositions and the Robinson depositions (as well as the Robinson reports accompanying materials) will be subject to the Agreed Protective Order entered in this case in March, 2000.

Dated: August 7, 2000

/s/ _____
Robert A. Gammage

/s/ _____
Michael L. Beatty

/s/ _____
Lawrence R. Abramczyk

(The signatures of arbitrators Gammage and Beatty were authorized by telephone.)

APPENDIX O

AMERICAN ARBITRATION ASSOCIATION

[Dated May 23, 2000]

Re:	54 117 00326 98	)
	Ford Dealer Computer Services, Inc.	)
	n/k/a Dealer Computer Services, Inc.	)
	and	)
	Prestige Ford	)
		)

SECOND ORDER CONCERNING DISCOVERY

Having read the briefs and having heard argument in this matter in a conference call held on May 22, 2000, the Arbitrators make the following rulings regarding discovery of documents:

1. Claimant Dealer Computer Services, Inc. ("DCS") need not produce its IRS Forms 1120.

2. (a) DCS shall, for the period 1993 to the present, produce for inspection and copying by Respondent Prestige Ford DCS's quarterly and annual balance sheets and income statements, if any there be.

(b) DCS shall also produce, for the same time period, any coded entries in the general ledgers which separately identify revenues from sales and/or leases of DCS dealer management systems, if, but only if, those revenues can be

identified from particular line items or accounts already contained in the general ledger. DCS need not undertake any study to calculate such revenues.

3. To the extent such documents exist, DCS shall produce for inspection and copying by Prestige Ford any documents containing, for the period 1993 to the present, a statement of DCS's sales revenues from the sale and/or lease of DCS's dealership management system to the dealerships within the geographic area of Prestige Ford's registration sales (owner's registration location after sale), including the following areas of orth Texas: Dallas County, Tarrant County, Denton County, Collin County, Rockwall County, Kaufman County and Ellis County. The Arbitrators are aware Claimant's counsel has preliminarily advised that such documents probably do not exist, but DCS shall either confirm in writing to Respondent such to be the case or otherwise produce the documents.

4. To the extent any such documents exist, DCS shall provide for inspection and copying by Prestige Ford any documents containing, for the period 1993 to the present, a list of DCS's customers for DCS's dealer management System and, further, any documents containing a statement of sales revenues received by DCS from said dealer-management-system customers. Again, if such documents do not exist, DCS shall confirm such in writing to Respondent.

5. DCS has agreed to provide to Prestige Ford, and shall so provide, all documents regarding DCS's market share of Ford dealership dealer-management-system business from 1993 to the present in (a) Texas and (b) the United States.

All of the foregoing documents, as well as any information therein contained, shall be subject to the terms of Agreed Protective Order already entered in this case.

Dated: May 23, 2000

/s/ _____
Robert A. Gammage

/s/ _____
Michael L. Beatty

/s/ _____
Lawrence R. Abramczyk

(The signatures of arbitrators Gammage and Beatty were authorized by telephone.)

APPENDIX P

AMERICAN ARBITRATION ASSOCIATION

Re: 54 117 00326 98

Ford Dealer Computer Services, Inc.
n/k/a Dealer Computer
and
Prestige Ford

ORDER CONCERNING DISCOVERY

Having read the briefs and heard oral argument in a conference call hearing held on January 18, 2000, 200, the arbitrators make the following orders:

1. Prestige Ford must plead specific fact allegations for each statutory antitrust violation contained in the counterclaim within 30 days of this order.

2. Prestige Ford must answer interrogatories numbers 19 through 26, inclusive, of the First Set of Interrogatories of Dealer Computer Services, Inc. ("DCS"), within 30 days of this order.

3. In response to Request Number 12 of Prestige Ford's First Request for Production, DCS must provide the requested documentation regarding other disputes with Ford dealerships that have resulted in arbitration or litigation arising out of any contract between 1993 and present time. Prestige Ford has limited its request to

the filed complaint for each lawsuit and the names of the parties to any arbitration.

5. The panel will withhold rulings on the motion to compel a response to Request Number 14 of Prestige Ford's First Request for Production, pending receipt of the specific fact allegations requested in paragraph 1 of this order. The panel will rule *sua sponte* thereafter.

6. The panel recognizes that certain other disputed requests will be the subject of further negotiation between the parties. In the event the parties are not able to resolve those differences, the panel will address those issues.

Dated: January 21, 2000

/s/ _____
Robert A. Gammage

/s/ _____
Michael L. Beatty

/s/ _____
Lawrence R. Abramczyk

APPENDIX Q

Allen Self, Ph. D.
Economic, Management, Financial & Business Consulting
2004 Hillcrest Street
Fort Worth, Texas 76107
Fax 817-738-8392
Telephone 817-738-7879

[Dated January 15, 2000]

Mr. Henry Simpson, Esq.
Simpson, Woolley, McConachie, L.L.P.
700 The Quadrangle
2828 Routh Street
Dallas, TX 75201
214-871-5080, Fax 214-871-5090

Re: Dealer Computer Services, Inc. v. Prestige Ford
American Arbitration Association
Case No. 54 117 00326 98

Dear Mr. Simpson:

I have been retained to provide expert assistance to your law firm, counsel for the above-referenced automobile dealership entity pertaining to your clients' antitrust and related claims against Dealer Computer Services (collectively "DCS") in this matter. My background and experience is summarized on the attached and incorporated brief background sketch (c.v.) Denominated Exhibit "A" hereto.

According to the documents provided to me, Prestige Ford has alleged various actions against DCS based upon violations of the Sherman Antitrust Act ("per se" violations per Section 1), the Clayton Act (violations with respect to goods in interstate commerce per 15 USC Section 14), and the Robinson-Patman Act.

After review of the materials provided to me thus far, including the parties' written agreements, it is my preliminary opinion that subject to receipt and evaluation of certain materials to be received from or on behalf of DCS, it appears that Prestige Ford has adequately alleged antitrust violations by DCS.

Certain documents are necessary to reach an informed conclusion concerning certain aspects of antitrust law violations. These include measures of the DCS penetration of the market that it serves; usually, this is provided by accurate and dependable financial statements of some sort, of which the corporate tax return in often the best. The corporate tax return also shows others costs and expenses, as well as revenues, net income, and the corporate balance sheet at the beginning of each year and at yearend. These documents are, I believe, necessary for me to analyze properly the antitrust issues in the context of this action.

The financial statements are also necessary to appraise properly the damage claimed by DCS with respect to lost profits, if any. The essence of the expert report provided so far by DCS is that all of the revenue from Prestige Ford's computer services contract is profit and that all costs are fixed costs. This contention flies in the face of typical managerial accounting and business practice. In any event, the

contentions of the DCS expert's report must be based upon reliable and accurate information about DCS, and the 1120 tax returns are usually considered reliable and accurate, since they are submitted under the penalties of federal civil and criminal law. Obviously, no other source can provide such data, since DCS does not appear to be a publicly-held corporation under the supervision of the SEC.

With respect to RFP #4, in order to specify the relevant market for services of DCS within a region, it is necessary to have data on revenues from dealerships within a reasonable distance from Prestige Ford, as specified in the document request for production. This includes the nearby counties of Dallas, Tarrant, Denton, Collin, Rockwall, Kaufman, and Ellis.

Additionally, documents in response to the following RFP's would be relevant for these purposes as well:

RFP # 5, relating to dollar volume of sales to identified customers of DCS, would be relevant to my analysis of DCS' possible exercise of monopoly power;

RFP # 6, which relates to documents with respect to market shares in Texas and the United States.

As such, it is my opinion that the materials set forth above should be compelled of DCS as being necessary in order for Prestige Ford to properly present and prove its case against DCS. If the materials confirm the allegations of Prestige Ford, then Prestige Ford will have stated valid claims pertaining to antitrust violations by DCS. Prestige Ford would be entitled to damages based thereon.

Once I shall have reviewed documents in response to the above categories, I expect to advise you and your clients of additional documents which might be examined. It should be therefore noted that it is my opinion, having assisted parties in the context of antitrust cases since 1947, that documents evidencing antitrust activity and violations may not necessarily be described, in advance, in great particularity and as such, the categories of documents to be examined in this regard need to be broadly stated.

Should you have any questions, please do not hesitate to call me.

Respectfully submitted,

/s/ _____

Allen Self, Ph.D.
Attachment: Three-page brief biographical sketch (c.v.)
January 15, 2000
C:\office\wpwin\wpdocssimappres.120

Allen Self, Ph. D.
Economic, Management, Financial & Business Consultant
2004 Hillcrest Street
Fort Worth, Texas 76107-3962
Telephone 817-738-7879
Fax 817-738-8392

[November 3, 1999]

Home Address: 6100 Curzon Avenue, Fort Worth Texas 76116, 817-731-1342.

Education: Alamo Heights High School, San Antonio, Texas, 1944.
B.A. (History, Economics), Texas A & M University, 1947.
M.A. (Economics), University of North Texas, 1949.
Ph.D. (Economics), University of Oklahoma, 1957.

Postdoctoral Study:
Harvard Graduate School of Business, 1961.
Carnegie-Mellon University Graduate School of Industrial Administration, 1963.

Academic Honors:

At Texas A & M: Distinguished Student, Distinguished Military Graduate, Candidate for Valedictorian, Editor of The Battalion (daily newspaper), Cadet Corps Executive Officer and Corps Commander, Captain and Southwest Conference Swimming Champion.

At U. of Oklahoma: Beta Gamma Sigma (Business Honor Society).

Brief Biographical Sketch, Dr. Allen Self

At TCU: Omicron Delta Epsilon (Economics Honor Society).

At UNT: Ford Foundation Research Fellow, 1964.

President, Texas Conference, American Association of University Professors; Board Member, National AAUP.

Life Member, Southwest Division, Academy of Management.

Military Service:

Commissioned Second Lieutenant in U.S. Army Artillery Reserve, 1949.

Active Duty, during Korean War, 1951-1953, as Battery Executive Officer, Battalion Survey Officer, and Battalion Adjutant, 198th Field Artillery Battalion.

Active Duty, 1955, at Field Artillery Motor Officers School, first in class.

Battalion Executive Officer, 1956-1957, Reserve Field Artillery Observation Battalion.

Honorably Discharged as Captain, U.S. Army Artillery, 1960.

Personal:

Married to Marianne Stripling Self, 1980.

Licensed Airplane Pilot. Experienced sailboat owner, skipper and racer.

Senior Member; former Treasurer and Board of Governors; Fort Worth Boat Club.

Formerly stock farmer; former marine retail store owner.

Brief Biographical Sketch, Dr. Allen Self

Father of three children: Fred A. Self, President, Records Disposal, Inc., Dallas; Scott L. Self, President, ProSoap, Inc., Rockwall; Rebecca Self Doody, R.N., Glendale, California.
Publications and Research:

Co-author (with John A. Patton and C.L. Littlefield), Job Evaluation: Text and Cases, Third Edition, Richard D. Irwin, Inc, 1964.

Editor (posthumous), C.D. Williamson, Executive Operations Technique, Prentice - Hall, Inc., 1963.

Municipal Electric Utility Systems in Oklahoma, University Microfilms, 1958.

The Dairy Industry and the Texas Antitrust Laws, unpublished master's thesis, North Texas State University, 1949.

Co-author (with B.G. Havill and John E. Pearson), "Programming Circular Antocorrelation for Cycle Research," Journal of Cycle Research, Vol. 9, No. 3, July 1960.

"A Method for Peer Rating on a Student Team Project," Collegiate News and Views, December 1963.

White Settlement, Texas; An Economic Base Study, Bureau of Business Research, Texas Christian University, 1966.

Loan Resources for Poverty Groups in Tarrant County, Bureau of Business Research, Texas Christian University, 1966.

Editor and Project Director, Economic Impact of the Mobile Home Industry in Texas, Bureau of Business Research, Texas Christian University, 1967.

Co-author (with C. Richard Waits), Mountain Valley Recreation Area, Bureau of Business Research, Texas Christian University, 1967.

Co-author (with Joe Lee Steele and Ike H. Harrison), University Bank Office Complex, Bureau of Business Research, Texas Christian University, 1969.

Co-author (with Joe Lee Steele), West Side State Bank: Market, Facilities, and Future, Bureau of Business Research, Texas Christian University, 1970.

Co-author (with Joe Lee Steele), South Fort Worth State Bank: Building Complex Feasibility Study, Bureau of Business Research, Texas Christian University, 1970.

Southwest Bank of Fort Worth: Its Market, Its Building, Its Future, Bureau of Business Research, Texas Christian University, 1973.

Papers Presented at Southwest Economics Association and National Forensic Economics Association joint meetings, annually:

1996: Modern Economic Analysis and Antitrust Damages, March 22, 1996, Houston.

1994: (With Dr. Floyd Durbarn), The Economist's Role in Determining the Division of Community and Separate Small Closely-Held Business Property in Divorce Proceedings

in Community Property States Such as Texas, San Antonio, March 1994.

1993: Accounting Requirements in Testimony in Last Profits Estimation, March 19, 1993, New Orleans.

1992: Use of Accounting and Finance Concepts in Calculating Lost Profits, March 6, 1992, San Antonio.

Consulting and Business Activity:

Since 1957, a large number of consulting projects with large and small corporations, including banks, savings and loan associations, manufacturing companies, insurance companies, and many others. Since 1967, expert economic consultant and expert witness in antitrust , banking, business and bank evaluation, complex financial disputes, personal injury, wrongful death, divorce, and similar matters, in state and federal courts, Federal Tax Court, and administrative agencies.

Employment:

Summer, 1946: Campaign assistant to Hon. Price Daniel in Texas Attorney General primary campaign.

Summer, 1947: Investigator, Antitrust Division, Texas Attorney General, Austin.

1947-48: Assistant Office of the President, North Texas State University

Fall, 1948: Teaching Fellow, Economics Department, Texas A & M University

Spring, 1949: Teaching Fellow, Economics Department, North Texas State University.

1949-54: Instructor, Victoria College, Victoria, Texas.

(1951-1953: U.S. Army Artillery, Extended Active Duty, as Second Lieutenant and First Lieutenant, 198th Field Artillery Battalion.)

1954-1956: Instructor, Economics Department, University of Oklahoma.

1956-1957: Fellow, Woodrow Wilson Fund, University of Oklahoma.

1957-1964: Assistant Professor, 1957-1959; Associate Professor, 1959-1963; Full Professor, 1963-1964; Acting Chairman, Management Department, 1963-1964.

Summer, 1959: Economist, Planning Department, Texas Electric Service Co., subsidiary of Texas Utilities.

1964-1990: Professor of Management, Texas Christian University; Chairman, Management and Marketing Department, 1971-1975; Director, Bureau of Business Research,
1964-1967. Appointed Emeritus Professor of Management, 1990, upon retirement from Texas Christian University.

May, 1989-Present: Self-employed as Consultant.

Civic Activities:

Zoning Board of Adjustment, City of Denton, Texas, 1957-1959

Member, Vice-Chairman, Planning & Zoning Board, City of Denton, Texas, 1959-1963.

Elected to City Council, City of Denton, Texas, 1963-1964.

Dallas-Fort Worth Airport Zoning Board, Tarrant County Representative.

Special Master, Federal Court, Northern District of Texas.

Professional Associations:

Life Member; Academy of Management, Southwest Division.

Brief Biographical Sketch, Dr. Allen Self

Economics Division, Southwestern Social Science Association.

November 3, 1999

Supreme Court, U.S.
FILED
OCT 30 2003
OFFICE OF THE CLERK

No. 03-113

In the Supreme Court of the United States

PRESTIGE FORD,

Petitioner,

v.

DEALER COMPUTER SERVICES, INC.,
FORMERLY KNOWN AS FORD DEALER COMPUTER SERVICES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

JAMES D. BLUME
Counsel of Record

BLUME & STODDARD
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Counsel for Petitioner

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CINCINNATI, OHIO 800-890-5001

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

Petitioner hereby moves, pursuant to Rule 44.2 of the Supreme Court Rules, for rehearing on their Petition for Writ of Certiorari. In support thereof, Petitioner makes the following arguments: 1) This Court should vacate the arbitration award because Petitioner was denied a fundamentally fair hearing and 2) this Court should vacate the arbitration award pursuant to the public policy exception that was judicially created by this Court in *W.R. Grace and Co. v. Local Union No. 759*, 461 U.S. 757 (1983) and *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

1. This Court should vacate the arbitration award because Petitioner was denied a fundamentally fair hearing.

Arbitrators are not bound by the formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing. *See National Boatland, Inc. v. ITT Commercial Finance Corp.*, No. 99-1301, 2000 U.S. App. LEXIS 24783, at *6-7 (6th Cir. Sept. 19, 2000) *See also National Post Office v. U.S. Postal Serv.*, 751 F.2d 834, 841 (6th Cir. 1985). Fundamental fairness requires only notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the arbitrators. *See Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994). *See also Israel Salei v. Shearson Lehman Brothers, Inc.*, No. 95-CV-75376-DT, 1996 U.S. Dist. LEXIS 7620, at *12 (E.D. Mich. Apr. 30, 1996). Vacatur is appropriate only when the exclusion of relevant

evidence so affects the rights of a party that it may be said the party was deprived of a fair hearing. *See Israel Salei*, No. 95-CV-75376-DT, 1996 U.S. Dist. LEXIS 7620, at *14 (citing *Hoteles Condado Beach, La Concha and Convention Ctr. v. Union de Tronquistas Local 901*, 763 F.2d 34, 39-40 (1st Cir. 1985)). This is because the arbitrator is not bound to hear all of the evidence tendered by the parties; however, the arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments. *See Israel Salei*, No. 95-CV-75376-DT, 1996 U.S. Dist. LEXIS 7620, at *14 (citing *Hoteles Condado Beach, La Concha and Convention Ctr.*, 763 F.2d at 39).

Petitioner did not have the following material evidence at his disposal for presentation to the arbitration panel for the following reasons: 1) the complete revenue and expense portion of the general ledger because although the arbitration panel ordered Respondent to produce it, it did not;[1] 2) Texas franchise tax reports [2] because the arbitration panel denied Petitioner's Motion to Compel; 3) Respondent's tax returns[3] because the arbitration panel denied Petitioner's Motion to

---

[1] The revenue and expense portion as produced contained no cash account and no expenses attributable solely to Respondent. See App. J at 52 and App. I at 44-48 to Petitioner's Petition for Writ of Certiorari.

[2] App. K at 63 to Petition for Writ of Certiorari.

[3] App. O at 103, App. H at 35-40, App. Q at 108-111 to Petition for Writ of Certiorari.

Compel; and 4) the complete financial statements[4] because the arbitration panel denied Petitioner's Motion to Compel.

This evidence was relevant and material and not simply collateral to the elements of Petitioner's claims. Moreover, it was not cumulative of other evidence Petitioner presented. *See National Post Office*, 751 F.2d at 841. See Appendices H, I, J, M, and Q to Petition for Writ of Certiorari. By refusing Petitioner the right to present this evidence, the arbitration panel eviscerated Petitioner's ability to present any material evidence in support of its counterclaims for breach of contract, fraud, and anti-trust violations. The net effect of which prevented Petitioner from meeting its burden of proof and thereby depriving Petitioner of a fundamentally fair hearing.

2. This Court should vacate the arbitration award pursuant to the public policy exception judicially created by this Court in *W.R. Grace and Co. v. Local Union No. 759*, 461 U.S. 757, 766 (1983) and *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

The public policy exception is a judicially-created exception that provides an additional basis for reversing an arbitration award where the terms of the arbitration contract, either expressly or as interpreted by the arbitrators, violate public policy or where the award requires parties to undertake some action in violation of public policy. *See Bowles Financial Group, Inc.*, 22 F.3d at 1013 (citing *Misco, Inc.*, 484 U.S. at 42-44). *See also W.R. Grace and Co.*, 461 U.S.

---

[4] App. K, O, App. H at 35-40, App. Q at 108-111 to Petition for Writ of Certiorari.

at 766; *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993). A court may refuse to enforce a contract where the specific terms contained in the contract violate public policy. *See Misco, Inc.*, 484 U.S. at 36. The decision to reverse an award must be based on explicit conflict with other laws and legal precedents rather than an assessment of general considerations of supposed public interests. *See id.* at 43 (quoting *W.R. Grace and Co.*, 461 U.S. at 766).

To prove that a contract is unconscionable under Michigan law, a plaintiff must demonstrate that the arbitration provision is both procedurally and substantively unconscionable. *See Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp.2d 1087, 1100 (W.D. Mich. 2000) (citations omitted). In order to determine whether a contract is procedurally unconscionable, courts typically consider the relative bargaining power of the parties, their relative economic strength, whether the contract is expressed in standardized language prepared by the stronger party to meet its needs, and whether it is offered to the weaker party on a "take it or leave it" basis. *See id.* at 1100 (citations omitted). Where a contract is prepared by one party and offered for rejection or acceptance without the opportunity for bargaining under circumstances in which the party cannot obtain the desired product or service except by acquiescing to the form agreement, Michigan courts will conclude that the contract is adhesive and therefore procedurally unconscionable. *See Lozada*, 91 F. Supp.2d at 1100-01.

In the instant case, the contract entered into by Petitioner was both procedurally and substantively unconscionable making it void as against public policy. Mr. Randall Reed, the dealer-principal of Petitioner, executed the contract with Respondent. Mr. Reed stated during the arbitration hearing

that Ford Motor Company told Ford dealers that it was no longer going to support the existing Texas Instruments computer systems in the dealerships and that each dealership needed to purchase a new computer system from Ford Dealer Computer Services, Inc. See Appendix A, Arbitration, Day 3, pages 82-85. Despite using business cards with the Ford logo on them and at all times representing itself to be a division of Ford Motor Company, neither Ford Motor Company nor Ford Computer Dealer Services, Inc. as Respondent was then known, (hereinafter "DCS f/k/a FDCS" or "Respondent") explained to the dealerships that DCS f/k/a FDCS was not affiliated with Ford Motor Company. See Appendix A, Arbitration, Day 3, pages 82-85. Mr. Reed further testified that he told DCS f/k/a FDCS sales representatives that under no circumstances would he agree to enter into the contract for a term of longer than five years. See Appendix A, Arbitration, Day 3, pages 98-100. Approximately one year after Petitioner had entered into the contract, DCS f/k/a FDCS presented Petitioner an amendment to the contract containing a provision extending the term of the entire contract to ten years. See Appendix A, Arbitration, Day 3, page 98. Mr. Reed signed this amendment without it ever being explained to him. See Appendix A, Arbitration, Day 3, page 99-100. In sum, Respondent took advantage of its supposed affiliation with Ford Motor Company to secure Petitioner's original agreement to the contract and then submitted the amendment containing the ten year term extension to Petitioner on a take it or leave it basis. Given the foregoing, it is clear that the contract itself was procedurally unconscionable.

The contract was substantively unconscionable because it required the dealer to submit all of its claims arising out of the contract to arbitration but it allowed DCS f/k/a FDCS to pursue its available remedies at law. Section 18 states

"[c]ollection of any accrued amounts owed by Dealer to DCS f/k/a FDCS (and not disputed in writing with specificity within a reasonable period from the invoice date) shall not be subject to this arbitration procedure." See Appendix B, Section 18. Section 13 states that in the event a dealer breaches the agreement, DCS f/k/a FDCS may accelerate any and all amounts due to become immediately payable. See Appendix B, Section 13. DCS f/k/a FDCS's right to declare all amounts due and payable immediately and then pursue its rights to collect these amounts outside of the arbitration provision nullifies the arbitration provision.

Additionally, the contract is replete with one-sided terms and unfair provisions. *See Lozada*, 91 F. Supp. 2d at 1102. The following list is not exhaustive: the dealer waives its right to recover for breaches of any express or implied warranties with regard to DCS f/k/a FDCS's software, hardware, maintenance, and licensing services. See Exhibit B, Sections 2, 4, 5, 8. DCS f/k/a FDCS reserves all of its rights and remedies at law and at equity for the software. See Exhibit B, 7. DCS f/k/a FDCS limits its liability for monetary damages in the contract. See Exhibit B, Sections 2, 4, 5, 8. A dealer waives and releases its claims against DCS f/k/a FDCS for other types of claims and liabilities. See for example, Appendix B, Section 7.

Because the contract reserves rights for Respondent that were not available to Petitioner, both the contract and the arbitration provision were substantively unconscionable. Based on the foregoing proof of both procedural and substantive unconscionability, this Court should find the contract unconscionable and apply the public policy exception to vacate the arbitration award.

At least one circuit court, the Ninth Circuit Court of

Appeals, has found in favor of a dealer who sought to rescind its contract with DCS f/k/a FDCS. In *James Ford, Inc. v. Ford Dealer Computer Services, Inc.*, No. 01-16067, 2003 WL 245220, at *1 (9th Cir. Jan. 31, 2003), James Ford, Inc. made virtually the same factual and legal allegations against Respondent that Petitioner has made here. James Ford sued DCS f/k/a FDCS and Universal Computer Systems, Inc. for fraud, breach of contract, and violations of the California Unfair Competition Act. *See id.* at *1. The contract signed by James Ford was almost identical to the contract signed by Petitioner.[5] The arbitrator rescinded the contract, identifying multiple grounds for rescission, including FDCS's fraudulent representations, the computer system's failure to serve its essential purpose, and FDCS's violations of the California Unfair Competition Act. *See id.* This Court should follow the Ninth Circuit Court of Appeals' lead and rescind the contract.

CONCLUSION

This Court should vacate the arbitration award because Petitioner was denied its right to present relevant and material evidence in deprivation of its right to a fundamentally fair hearing. In the alternative, this Court should find the contract itself both procedurally and substantively unconscionable and apply the public policy exception to vacate the arbitration award. By vacating the arbitration award on either ground, this Court will restore public confidence in arbitration as a

---

[5] Respondent used the same standardized contract for each dealership with whom it contracted changing them somewhat from year to year. James Ford signed its contract with DCS f/k/a FDCS on or about July 13, 1994. Petitioner executed its contract with Respondent in January 1993.

fair and efficient alternative to litigation and it will protect the public against one of arbitration's inherent hazards, the possibility of being denied a fundamentally fair hearing guaranteed by the 5th and 14th Amendments to the United States Constitution.

Respectfully submitted,

BLUME & STODDARD,

By : James D. Blume
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, James D. Blume, certify as follows:

1. I am the attorney for Petitioner in this case. I prepared this Petition For Rehearing of Petition For Writ of Certiorari.

2. Pursuant to Rule 44.2 of the Supreme Court Rules, I certify that I have limited this Petition For Rehearing to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

3. This Petition is presented in good faith and not for the purpose of delay.

DATED: Oct 30, 2003.

Respectfully submitted,

BLUME & STODDARD,

By: James D. Blume
James D. Blume
Attorney for Petitioner

APPENDIX A

AMERICAN ARBITRATION ASSOCIATION

NO. 54-117-00326-98

Ford Dealer Computer Services, Inc., n/k/a Dealer Computer Services, Inc.	)
	)
v.	)
	)
Prestige Ford.	)
	)

ARBITRATION - DAY 3

AUGUST 8, 2001

TAKEN BY: JACK D. SYKES,
CSR, STATE OF TEXAS

APPEARANCES

THE ARBITRATION PANEL

Michael L. Beatty, Esq.
Robert A. Gammage, Esq.
Lawrence R. Abramczyk, Esq.

FOR THE CLAIMANT

John C. Allen, Esq.
and
Aaron D. Weinburg, Esq.
1225 Two Houston Center
909 Fannin
Houston, Texas 77010

FOR THE RESPONDENT/COUNTERCLAIMANT

James Blume, Esq.
and
Joshua H. Northam, Esq.
Blume & Stoddard
6116 N. Central Expressway
Suite 250
Dallas, Texas 75206

N. Henry Simpson, III
Simpson, Woolley & McConachie, L.L.P.
700 The Quadrangle
2828 Routh Street
Dallas, Texas 75201

ALSO PRESENT

Karen Lahrman, Paralegal
Michael Karkhoff, Prestige Ford

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MICHAEL KARKHOFF

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RANDALL REED

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MR. ALLEN: We are willing to do that.

MR. BLUME: And just to show you, I have cut my direct down as short as it is going to get.

RANDALL REED,
having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION

QUESTIONS BY MR. BLUME:

Q. Would you tell us your name, please, sir?

A. Randall L. Reed.

Q. What is your address, Mr. Reed?

A. Business address, 333 Inwood Road, Dallas, 75235.

Q. And what is that address?

A. Park Cities Ford.

Q. Is that one of the dealerships that you are currently involved in?

A. Yes, sir.

Q. Tell the panel briefly, if you would, your educational

background before you went into the car business.

A. Grew up in Littleton, Colorado. Attended Columbine High School, graduated in 1977. Attended

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generally called the front of the store, the sales department?

A. The front end, yes, sir.

Q. And then, also, there is another part of the dealership that is involved with parts, service, body shop and related entities, correct?

A. Correct.

Q. And who is the head of that section fo the store?

A. I had two, beginning with Phil Paulson, and then Mike Karkhoff.

Q. And so - - that's called the back of the store, right?

A. Correct.

Q. So it would have been you who hired Mr. Karkhoff here to be the parts and service director?

A. Mike was my parts manager at the time. And, yes, he was promoted up to parts and service director.

Q. Okay. Let me direct your attention back now to 1993.

Were there changes in the computer world for dealers in that era; do you recall any of those?

A. Yes, sir, I do. Primarily, we were on the DCS box, which was then owned by Ford Motor Company,

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which was in the process of selling out to Universal Computer Services. And it was told to us that they would no longer support the TI system that was in operation, and that we needed to make a change.

Q. Who was it that told you that TI wasn't going to - - that the TI system that you had was not going to be - -

A. Ford Motor Company.

Q. You knew, I gather from your comments, that Dealer Computer Services department was being sold to UCS.

A. Yes, sir.

Q. Did you know what the relationship between Ford and UCS and DCS was; exactly?

A. No, sir.

Q. Open, if you would - - there's the blue notebook that's right under your deposition. Would you open that to Tab. No. 9. Do you see there a bunch - - do you see there a bunch of cards that have been copied?

A. Yes.

Q. Are those the kinds of business cards you were provided by UCS representatives?

A. The one with the Ford logo?

Q. Well, either or both.

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A. Primarily, it was the Ford logo on the business cards. Those are the people I dealt with.

Q. Did you ever hear the Ford Dealer Computer Services was a preferred vendor?

A. Absolutely.

Q. What did that mean to you?

A. That meant that Ford, which was in, obviously, the process of selling their computer system, DCS, to UCS, recommended, highly recommended, UCS as the dealership system.

Q. Well, when you were told the TI system was no longer going to be supported, did you make the decision that you needed to obtain a new computer system?

A. Yes, sir.

Q. And you just intimated - - I want to get clear about this - -

did Ford representatives encourage you to buy a system from Ford Dealer Computer Services?

A. Yes, sir.

Q. What did they do to encourage you?

A. Well, they offered incentives on the system, telling us that basically if we would purchase the new computer they would give use the actual box, the mainframe for free. So all we would have to pay for

[p. 85]

is any peripheral and licensing.

Q. Okay. Did FDCS representatives call on you during this period of time.
A. Yes.

Q. How often?

A. Weekly, if not daily.

Q. And these were sales calls?

A. Yes, primarily.

Q. And do you recall who the salesmen were that came to see you?

A. The two that most - - were most predominant in my mind were Tom Russell and Guy Nickisea (phon).

Q. Do you remember a representative of theirs named Ray Hoffman?

A. I would probably recognize him if I saw him, but the name doesn't mean anything.

Q. He is not here in the room, is he? None of these gentlemen are Mr. Hoffman? You don't think so?

A. I don't think so.

Q. Okay. Did you - - do you recall what you were told about the computer itself, the box, as you termed it?

A. The mainframe?

Q. Yes.

A. It was the fastest, most advanced system

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the main - - the term of the main contract from five years to 10?

A. No, not that I recall.

Q. Did you ever tell DCS representatives that you would not agree to extend past five years?

A. From day one.

MR. BEATTY: 803

Q. Did you agree, in the course of this amendment, that you wold extend the term from five years to 10?

A. No, not to my knowledge.

Q. If it were true that Paragraph 1 attempts to do that, that is, extend the term from five to 10, is that something you agreed to?

A. I never would have agreed to that.

Q. What is the date - - turn back, I think it's four pages, Randy. Turn back to the - - no, no. Go the other way. What is the date on Amendment 17?

A. The Amendment 17?

Q. Yeah. The one you just looked at. I want to know what the date on it is.

A. 12-28-94.

Q. How long after your initial installation of the computer would that have been?

A. Approximately a year.

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Q. Were you so satisfied with this DCS computer that you agreed to extend the term from five years to 10?

A. No.

Q. Did you understand that language in Paragraph 1? Let me rephrase the question. Did you notice the language?

A. No.

Q. Was it explained to you by any DCS representative?

A. No.

Q. Did you have a discussion with a DCS representative about changing the term in any way, shape or form at the time?

A. Not on this contract. I knew that CPD was 84 months. I knew that wasn't an option. That was never offered in any shorter term.

Q. Is it your understanding, then that it was 84 months or nothing, on CPD contract?

A. Yes.

Q. You didn't like that very much, but you agreed to it?

A. Yeah. It was just a small part of the system.

Q. Do you remember ever, at any time, a DCS
[p. 100]

salesman coming to you and saying - - and asking you if you would agree to an extension on the main contract?

A. No.

MR. BLUME: Pass the witness

CROSS EXAMINATION

QUESTIONS BY MR. ALLEN:

Q. Mr. Reed, I want to talk to you initially about your background and experience. You have been working in dealerships since approximately 1981, is that correct?

A. In sales - - in the sales side of dealerships, yes. I was in the fixed-in side of it earlier than that.

Q. When you were at - - that's when you first started at Courtesy as a salesman, right?

A. Yes, sir.

Q. And then you worked for - - after two years you became a finance manager, right?

A. Yes, sir.

Q. And after three years as finance manager, you became a sales manager, right?

A. Yes, sir.

Q. And after you were a sales manager, you became a general manager, did you not?

APPENDIX B

FORD DEALER COMPUTER SERVICES, INC.

This Agreement is between: Prestige Ford
Name

3401 S. Garland Rd.
Address

Garland, TX 75041
City State Zip

hereinafter referred to as Dealer, and FORD DEALER COMPUTER SERVICES, INC., hereinafter referred to as FDCS.

THIS AGREEMENT IS SUBJECT TO ARBITRATION UNDER APPLICABLE STATUTE.

SECTION 1. DEFINITIONS.

* * *

SECTION 2. SALE OF EQUIPMENT.

FDCS agrees to sell to Dealer and Dealer agrees to buy. the Equipment listed in Schedule A, subject to the terms and conditions of this Agreement.

* * *

E. Disclaimer of Equipment Warranties and Limitation of Liability.

FDCS warrants that the computer Equipment covered in this Agreement will perform according to the written specifications published by FDCS. Dealer acknowledges and agrees that FDCS is not the original manufacturer of the computer Equipment covered in this Agreement.

FDCS does not warrant that any specific level of system availability (up-time) will be achieved. Dealer acknowledges and agrees that the operation of an on-line computer system is a task of the highest level of technical complexity and that computer systems, like all mechanical devices, are subject to breakdown. Dealer further acknowledges and agrees that lack of system availability (down-time) does not constitute a breach of this Agreement.

EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY FDCS WITH RESPECT TO THE EQUIPMENT COVERED UNDER THIS AGREEMENT: IN NO EVENT SHALL FDCS BE LIABLE TO DEALER FOR LOSS OF PROFITS OR OTHER ECONOMIC LOSS, SPECIAL, CONSEQUENTIAL OR INCIDENTAL DAMAGES, EVEN IF IT HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. FDCS SHALL NOT BE LIABLE FOR ANY DAMAGES CAUSED BY DELAY IN DELIVERY. INSTALLATION OR FURNISHING OF THE EQUIPMENT UNDER THIS AGREEMENT.

THE SOLE AND EXCLUSIVE REMEDY OF DEALER FOR LIABILITY OF ANY KIND WITH RESPECT TO THE EQUIPMENT IS REPAIR OR REPLACEMENT OF THE EQUIPMENT. IN NO EVENT SHALL FDCS' LIABILITY FOR DAMAGES WITH RESPECT TO ANY OF THE EQUIPMENT FURNISHED UNDER THIS AGREEMENT EXCEED THE CHARGES PREVIOUSLY PAID BY DEALER ATTRIBUTABLE TO SAID ITEM.

* * *

SECTION 4. EQUIPMENT MAINTENANCE SERVICES

FDCS will provide Remedial Maintenance services upon the Equipment listed in Schedule C.

* * *

H. Disclaimer of Equipment Maintenance Warranties and Limitation of Liability.

FDCS warrants that so long as Dealer pays the Monthly Maintenance Charge on a timely basis that FDCS will perform Remedial Maintenance as necessary to return any failed piece of Equipment covered by this Agreement to operational condition during the term of this Agreement.

Dealer acknowledges and agrees that the maintenance of data-processing equipment is an undertaking of considerable technical complexity. Therefore, Dealer agrees that FDCS' responsibilities for Remedial Maintenance extend only to making a reasonable and good faith effort to repair the Equipment until it is returned to operational order.

Although FDCS will make a reasonable and good faith effort to resolve any Remedial Maintenance problems and return any Equipment covered by this Agreement to operational order, FDCS does not warrant any of the following:

1. That the Equipment covered herein will achieve any specific level of usability or reliability.

2. That any piece of Equipment repaired under this Agreement will always be repaired on the first attempt.

3. That the repair of any piece of Equipment will be achieved in any specific set amount of time.

4. That the Equipment will be enhanced, improved, or otherwise modified.

Dealer relieves FDCS of any liability resulting from any Equipment outage or failure other than that caused by FDCS' failure to make reasonable and good faith effort to perform Remedial Maintenance on the Equipment covered under this Agreement.

EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY FDCS WITH RESPECT TO THE MAINTENANCE SERVICES, FURNISHING OF PARTS, INSTALLATION OF EQUIPMENT OR OTHER TRANSACTIONS CONTEMPLATED HEREIN.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, FDCS SHALL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE TO DEALER FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, EVEN IF FDCS HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. IN NO EVENT SHALL FDCS' LIABILITY TO DEALER ARISING OUT OF THIS AGREEMENT EXCEED THE AMOUNT REPRESENTED BY THAT PORTION OF THE MONTHLY MAINTENANCE CHARGES ATTRIBUTABLE TO ANY NON-OPERATIONAL ITEM OF EQUIPMENT.

SECTION 5. SOFTWARE LICENSE.

* * *

C. Confidentiality.

* * *

Because of the unique and proprietary nature of the Licensed Software, Dealer agrees that FDCS' remedies at law for a breach of confidentiality by Dealer or its employees are inadequate and that FDCS shall be entitled to equitable relief, including without limitation, injunctive relief, specific performance or other equitable remedies in addition to all other remedies provided at law or in equity.

D. Disclaimer of Software Warranties and Limitation of Liability.

FDCS warrants that the Licensed Software shall conform in all material respects to the design specifications and functions and will perform on the machines and with operating systems for which it is designed. If FDCS is not informed in writing of non-conformance due to errors which significantly affect performance of the Licensed Software in accordance with the design specifications and functions within the first five (5) days after installation, the Licensed Software shall be deemed to be conforming at the time of installation. Thereafter, FDCS will provide Application Program Consulting Services as described in this Agreement.

Dealer agrees that the inability, of any FDCS Program to perform a function that it was not designed or intended to do is not a defect. Dealer further agrees that at the time of signing this Agreement it has examined the operation of the FDCS Operating System and Application Programs and found their functions to be complete and satisfactory for Dealer's purposes. Dealer further agrees that prior to signing this Agreement it has verified independently the fact that these same Programs operate successfully in other dealerships. Dealer understands and agrees that in order for any Application Program to be successfully installed, Dealer's employees must be sufficiently intelligent, motivated, and have sufficient time to devote to the installation.

FDCS does not warrant that any specific degree of system availability (up-time) will be achieved. Dealer acknowledges and agrees that the operation of an on-line computer system is an undertaking of the highest degree of complexity and that some system outage (down-time) is inevitable. Dealer further acknowledges and agrees that lack of system availability (down-time) will not constitute a breach of this Agreement.

Dealer, therefore, agrees because of the foregoing facts that failure to obtain desired results is not the fault of FDCS Software and that no liability shall fall on FDCS for Dealer's failing to obtain results that it desires.

Dealer acknowledges that Dealer may be subject to federal, state and/or local laws or other governmental requirements regarding Dealer's use or retention of data maintained as part of Dealer's FDCS In-Dealership Computer System (e.g. Payroll, Human Resource Management), and Dealer further acknowledges and agrees that Dealer is solely responsible for determining and complying with such laws or requirements.

EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY FDCS WITH RESPECT TO THE LICENSED SOFTWARE OR OTHER TRANSACTIONS OR SERVICES CONTEMPLATED HEREIN. THIS AGREEMENT STATES THE ENTIRE OBLIGATION OF FDCS IN CONNECTION WITH THE LICENSE, INSTALLATION, SUPPORT OR OTHER TRANSACTIONS WITH RESPECT TO THE SOFTWARE.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, FDCS SHALL NOT UNDER ANY CIRCUMSTANCES, BE LIABLE TO DEALER FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, EVEN IF FDCS HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. FURTHERMORE,

FDCS SHALL NOT BE LIABLE TO DEALER FOR DAMAGE OR LOSS OF ANY NATURE, WHATSOEVER, AND DEALER'S SOLE AND EXCLUSIVE REMEDY HEREUNDER SHALL BE THE RIGHT TO HAVE FDCS REPLACE OR CORRECT MATERIALLY DEFECTIVE SOFTWARE. IN ANY EVENT, IF FOR ANY REASON FDCS IS NOT ABLE TO REPLACE OR CORRECT MATERIALLY DEFECTIVE SOFTWARE, FDCS SHALL NOT BE LIABLE TO DEALER FOR ANY AMOUNT GREATER THAN THE AMOUNT PAID BY DEALER TO FDCS FOR THE DEFECTIVE SOFTWARE.

* * *

SECTION 7. SOFTWARE SUPPORT SERVICES.

* * *

C. Manufacturer's Data.

* * *

Dealer hereby waives and releases all claims of any nature whatsoever against FDCS and relieves FDCS of all liabilities due to errors, omissions, and delays in the manufacturer's date (including pricing data).

* * *

SECTION 8. ON-LINE PARTS AND VEHICLE LOCATOR SERVICE.

FDCS will provide Dealer access to the On-Line Parts and Vehicle Locator Service for the charges stated in Schedule E.

* * *

C. Permission to Disclose Dealer Data.

The very essence of the On-Line Parts and Vehicle Locator Service is the sharing of data regarding parts and vehicle inventories among the clients of FDCS. Dealer therefore authorizes FDCS to provide Dealer's parts and vehicle inventory data to all other clients of FDCS.

D. Disclaimer of On-Line Parts and Vehicle Locator Service Warranties and Limitation of Liability.

FDCS represents that so long as Dealer pays the charges stated in Schedule E for connection to the On-Line Parts and Vehicle Locator Service, FDCS will make every reasonable effort to provide the On-Line Parts and Vehicle Locator Service to Dealer during the term of this Agreement. However, Dealer acknowledges and agrees that providing this Locator Service is an undertaking of the highest technical complexity. Dealer further acknowledges and agrees that in order for FDCS to provide this Locator Service, FDCS requires the services of other subcontractors, including Ford Motor Company and various communications companies, and the agreements that FDCS has with these subcontractors may not provide any recourse to FDCS in the event such subcontractor fails to perform as required.

DEALER THEREFORE RELEASES FDCS FROM ANY LIABILITIES WHATSOEVER FOR FAILURE TO PROVIDE ACCESS TO THE ON-LINE PARTS AND VEHICLE LOCATOR SERVICE (DOWN-TIME), FOR ANY FAILURE BY THIRD PARTIES, OR FOR ANY

OTHER REASON BEYOND FDCS' REASONABLE CONTROL.

EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY FDCS WITH RESPECT TO THE ON-LINE PARTS AND VEHICLE LOCATOR SERVICE OR ANY OTHER SERVICES CONTEMPLATED HEREIN.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, FDCS SHALL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE TO DEALER FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, EVEN IF IT HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. DEALER'S SOLE AND EXCLUSIVE REMEDY HEREUNDER SHALL BE RESTORATION OF THE PARTS AND VEHICLE LOCATOR SERVICE.

* * *

SECTION 10. TERM AND EXTENSION OF AGREEMENT.

The term of this Agreement shall be for eighty-four (84) months from the date when the computer system is operational ('Original Term'), such date to be conclusively designated by FDCS. Following the expiration of the Original Term, this Agreement shall automatically be extended for like periods ('Extension Term'), unless either party gives the other written

notice to terminate one hundred eighty (180) days prior to the expiration of the Original Term or the then current Extension Term.

* * *

SECTION 13. DEFAULT.

In the event that Dealer defaults in any of the following ways:

A. By failing to pay any amount due hereunder in accordance with this Agreement; and/or

B. By otherwise being in breach of this Agreement; and/or

C. By becoming bankrupt or insolvent, or if a Petition is filed by or against the Dealer as bankrupt, insolvent, or a debtor under any federal or state bankruptcy, insolvency or reorganization law; and/or

D. By ceasing or threatening to cease to carry on Dealer's business; and/or

E. By making or proposing to make any sale of Dealer's assets in bulk or out of the ordinary course of Dealer's business; and/or

F. If FDCS in good faith deems the continued performance of Dealer hereunder to be insecure;

FDCS may pursue any one or more of the following remedies:

A. Declare all amounts due and to become due, immediately due and payable;

B. Suspend all Equipment maintenance and Software support services;

C. Demand and receive back all Equipment for which the total purchase price for such Equipment has not been paid;

D. Demand that Dealer immediately cease use of all FDCS Licensed Software and return to FDCS all copies of FDCS Licensed Software (including all Licensed Copies and Documentation) in Dealer's possession; and, in the event that Dealer does not voluntarily comply with such demand, an agent or representative of FDCS may enter upon Dealer's premises and disable or retrieve all FDCS Licensed Software;

E. Terminate this Agreement;

F. Retain all or such portion of payments made by Dealer hereunder as may be necessary to compensate FDCS for any damage, loss, liability, cost or expense (including, without limitation, payments to third parties) caused by such breach, default or failure, or, receive any additional payments from Dealer as may be necessary to compensate FDCS as described herein;

G. Pursue any additional or alternative remedies available at law or in equity.

Dealer agrees to reimburse FDCS for any and all expenses FDCS may incur, including reasonable attorneys' fees, in

collection of amounts due under this Agreement and in taking any of the foregoing actions.

* * *

SECTION 18. DISPUTE RESOLUTION.

The parties shall seek to resolve any controversy between them, first, by negotiating with each other in good faith negotiations between the respective principals of the parties; and, then, if negotiation is unsuccessful, by arbitration.

Except as provided otherwise in this Agreement, all disputes, claims, controversies and other matters in question between the parties to this Agreement, arising out of, of relating to this Agreement, or to the breach thereof, including any claim in which either party is demanding monetary damages of any nature including negligence, strict liability or intentional acts or omissions by either party, and which cannot be resolved by the parties, shall be settled by arbitration in accordance with the arbitration procedure described below. Collection of any accrued amounts owed by Dealer to FDCS (and not disputed in writing with specificity within a reasonable period from the invoice date) shall not be subject to this arbitration procedure. This arbitration procedure shall in no way limit FDCS' remedies as provided in Section 13.

Arbitration Procedure:

A. Either party may demand arbitration by providing the other party written notice of such demand. A matter will

then be deemed submitted to arbitration unless a valid reason exists as to why no legitimate dispute, claim or controversy exists.

B. All such matters shall be submitted to arbitration in Detroit, Michigan to be arbitrated by a person agreed upon by the parties to the dispute. If the parties cannot agree on an arbitrator within fifteen (15) days of receipt of the arbitration demand, and if both parties agree, a panel of three arbitrators shall be selected as follows: each party may select one arbitrator, to be selected within fifteen (15) days of the date both parties have agreed to select a panel, and both such arbitrators shall agree on a third arbitrator; if the two arbitrators so chosen cannot agree on the choice for a third arbitrator within fifteen (15) days thereafter, such third arbitrator will be chosen by a District Judge serving Wayne County, Michigan. If the parties have failed to agree on one arbitrator, and if either party does not agree to a panel of three arbitrators as described in the preceding sentence, the arbitrator shall be chosen by a District Judge serving Wayne County, Michigan. Any such arbitrators shall be chosen from a panel of persons with knowledge of electronic data processing industry practices, contracts, and data processing systems and without a demonstrable bias for or against either party.

C. Once a matter has been submitted to arbitration, the parties agree to schedule the arbitration hearing at the earliest possible date, but in no event more than sixty (60) days after the selection of the arbitrator or arbitration panel, except for legitimate and material reasons solely outside a party's control. However, such party shall have the burden of showing that any such delay is necessary for legitimate and

material reasons before the arbitrator or arbitration panel prior to the expiration of the 60-day period. Except as otherwise provided in this subsection, if a party's failure to cooperate in the scheduling of an arbitration hearing within the 60-day period shall result in any additional costs due to such delay (including but not limited to arbitration expenses and reasonable attorney's fees), such party shall reimburse the other party for any and all such costs.

D. Except as otherwise provided herein, the arbitration shall be governed by the commercial arbitration rules of the American Arbitration Association unless the parties agree to other rules and procedures.

E. In no event shall the demand for arbitration be made more than one (1) year after the claim or cause, of action arises.

F. The award of the arbitrator or arbitration panel shall be final and binding, and there shall be no appeal therefrom. Judgment upon the award rendered by the arbitrator or arbitration panel may be entered in any court having jurisdiction.

* * *

Executed as of the 28th day of January, 1993

Accepted By:

Ford Dealer Computer Services, Inc.
I000 Town Center
Suite 350

Southfield, Michigan 48075

By: /s/ Ken Bunney
Title: Controller
Date: 3-25-03

Dealer: P & A Code: 02415
Prestige Ford
3410 S. Garland Road
Garland, TX 75041

By: /s/ R.L. Reed
Title: Dealer
Date: 01/28/93

Ford Dealer Computer Services Contract

SEE

FOLD OUT EXHIBIT
CONTRACT AMENDMENT
NO. 17

FORD DEALER COMPUTER SERVICES, INC.

CONTRACT AMENDMENT NO.17

In accordance with Section 19, Paragraph B, of the Agreement between Ford Dealer Computer Services, Inc. and Prestige Ford, dated January 28, 1993, the parties hereby agree to amend the provisions of the Agreement as follows:

1.

2.

3.

This amendment in no way changes, terminates, or waives any other provision of this Agreement.

Executed as of the 29 day of December, 1994.

Accepted By:

Ford Dealer Computer Services, Inc.
1000 Town Center, Suite 350
Southfield, MI 48075

By: R. M. Nalley

Name: R. M. Nalley

Title: Executive Vice President

Date: 1/10/95

Dealer: D&A Code: 02415

Prestige Ford
3401 S. Garland Rd.
Garland, TX 75041

By: X

Name: X Randall C. Hoss

Title: X Dealer

Date: X 12-29-94